NIK NAZMI NIK AHMAD A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: B-09-303-11-2013]
25 APRIL 2014 C
[2014] CLJ JT(4)

CRIMINAL LAW: *Peaceful Assembly Act 2012 - Section 9(1) and 9(5) - Failure by organiser of assembly to give police ten days' notice - Restrictions under s. 9(1) - Whether ten days' notice unreasonable restriction on right of citizens to assemble peaceably and without arms - Whether non-compliance by organiser attracted criminal penalty - Whether criminalising breach of restrictions under s. 9(1) unconstitutional* D

STATUTORY INTERPRETATION: *Construction of statutes - Penal statutes - Failure by organiser of assembly to give police ten days' notice - Whether s. 9(5) Peaceful Assembly Act 2012 ('PAA') unconstitutional - Whether requirement under s. 9(1) of PAA unreasonable restriction on right of citizens to assemble peaceably and without arms - Article 10 Federal Constitution - Whether unconstitutional part of PAA could be severed from rest of Act - Article 4(1) Federal Constitution and doctrine of severability* E F

The appellant, an opposition party State Assemblyman, was charged in the Sessions Court for having organised a public assembly at an indoor stadium without having notified the Officer in Charge of the Police District ('OCPD') concerned ten days before the event. The 10-day notice requirement was contained in s. 9(1) of the Peaceful Assembly Act 2012 ('PAA'), s. 9(5) of which provided that a person who contravened s. 9(1) committed an offence which carried the penalty of a fine not exceeding RM10,000. The appellant had notified the OCPD about the assembly on the very day it was held. The assembly itself was held without any incident. Pursuant to him being charged, the appellant applied to the High Court to declare s. 9(1) and 9(5) of the PAA null and void and unconstitutional, for the charge against him to be struck out and for him to be acquitted and discharged of the charge. The High Court dismissed his application resulting in the instant appeal. The appellant *inter alia* argued that both G H I

A s. 9(1) and 9(5) of the PAA should be struck down as being *ultra vires* the Federal Constitution ('Constitution') because: (i) the requirement for a 10-day notice, for having totally prohibited a spontaneous or immediate assembly, was an unreasonable restriction on the constitutionally guaranteed right of citizens to B assemble peaceably; and (ii) even if the restriction under s. 9(1) was reasonable, it was legally and constitutionally wrong to criminalise its breach.

Held (allowing appeal; acquitting and discharging appellant) C Per Mohamad Ariff Yusof JCA:

(1) There was no provision in the PAA which stipulated that an assembly held without the giving of the requisite prior notice was *per se* unlawful. That which was fundamentally lawful could not, in the same breath, result in an unlawful act on the D part of the organiser by reason of an administrative failure or omission. Such a dichotomy was irrational in the legal sense. The effect of holding s. 9(5) valid would be to hold an organiser of an assembly criminally liable although the assembly itself was peaceful or there was full compliance with the terms E and conditions imposed. The legislative response was wholly disproportionate to the legislative objectives. (paras 41-43)

(2) Section 9(1), on the other hand, was constitutional. It could not be said that s. 9(1) could not pass constitutional muster F as a 'reasonable restriction'. It was not the court's domain to stipulate whether the 10-day notice should be shorter or that the law must recognise the rakyat's right to have an immediate assembly to voice out their dissent. Length of notice was a matter ultimately of legislative policy. The courts in testing the G constitutionality of legislative action should not substitute their own view on what ought to be the proper policy. The court's domain was to determine the legality of an action judged against proper legal standards, principles and rules. (para 40)

H **(3)** On the facts of the appeal and on the law, s. 9(1) and 9(5) could be severed since both were not incontrovertibly intertwined. Thus, while the giving of prior notice of ten days would still be required, any non-compliance on the part of the organiser would not attract a criminal penalty *per se*. (paras 44 I & 45)

Per Mah Weng Kwai JCA (concurring):

(1) Section 9(5) of the PAA was *ultra vires* art. 10 of the Constitution for criminalising a breach of the restriction under s. 9(1) and was therefore unconstitutional. The word 'restriction' was used several times in the Constitution *eg,* in arts. 67, 111, 112, 127, 135 and 151 (with regard to powers of government, legislature and Parliament) and also in arts. 9 and 10 with regard to fundamental liberties. But there was nothing in these articles to suggest that the breach of those 'restrictions' would give rise to criminal prosecution or sanction. Therefore, a consistent interpretation would be that the word 'restrictions' did not imply power to criminalise their breach. (paras 77, 78, & 81)

(2) The inconsistent and incongruous position created by s. 9(1) and 9(5) of the PAA was that whilst a participant in a peaceful assembly held without the 10-day notice committed no wrong, the organiser of the assembly would be criminally liable under s. 9(5) for not having given the 10-day notice. (para 82)

(3) The right to peaceful assembly, which ought to include the right to organise a peaceful assembly, could only be restricted reasonably and not prohibited. To be a 'permitted restriction' within the scope of art. 10(2)(b) of the Constitution, it must be reasonable and there must be a rational nexus between the requirement for the 10-day notice and the objective of maintaining public order or security in the Federation or any part thereof. The respondent failed to show how the failure to give the 10-day notice would necessarily result in a threat to national security or public order. The assembly in this case was held in a stadium at night which did not affect daily business life nor disrupt traffic. It was a static assembly and not a street procession or demonstration. (paras 96, 98 & 111)

(4) The restriction imposed by s. 9(1) and 9(5) of the PAA was not reasonable as it amounted to an effective prohibition against urgent and spontaneous assemblies. It would be impossible for an organiser to organise a spontaneous assembly without being under threat of prosecution. There was no provision in the PAA for any exemption even if the need for the assembly was extremely urgent. However, s. 9(1) on its own, without the offence and penalty in s. 9(5), did not have

A the effect of prohibiting urgent and spontaneous assemblies. Accordingly, s. 9(5) ought to be severed from the notice requirement in s. 9(1) and be struck down for being unconstitutional. (paras 109 & 113)

B **Per Hamid Sultan Abu Backer JCA (concurring):**

(1) There was no provision at all for those who assembled peacefully and without arms to be charged for any offence under the PAA. If the assembly itself was peaceful, then a penal sanction against the organisers would not qualify for any C intended protection as having direct nexus or proximity to art. 10(2) of the Constitution. (para 150)

(2) The PAA gave a right for everyone to assemble whether notice was or was not given. To criminalise for not giving notice and D penalising the organiser had no nexus to 'public order' or 'interest of the security of the Federation' unless the assembly was not peaceful. Section 9(5) failed the 'reasonable test' as well as the 'proportionality test' as it had no nexus to 'public order', 'security of the Federation' and/or an assembly which E was not peaceful. The burden was on the State to satisfy the court that the imposition of the restrictions was not only in the interest of the security of the Federation or of public order but also satisfied the test of reasonableness and fell within the parameters or framework of art. 10(2) of the F Constitution. (paras 141 & 148)

(3) Article 10 does not criminalise the breach of the restriction. It is not permissible to read into art. 10 to say that if there was breach of the restriction there must be penal sanction, more G so when the restriction had nothing to do with the assembly *per se*. Restrictions were procedural and/or administrative in nature. The framers of the Constitution did not provide for penal sanction or enactment of penal sanction for breach of restrictions. The Penal Code, Criminal Procedure Code and H other specific laws had sufficient penal laws to check 'law and order', 'public order', 'security of the Federation', 'public tranquillity', *etc*. (paras 138 & 141)

(4) Taking into consideration the rigid test relating to 'reasonable I restriction', the 10-day notice period was not excessive or a breach of art. 10(2) as it did not prohibit the public from assembling peacefully and without arms at any time, day or night. The 10-day notice which the organisers had to give had nothing to do with art. 10(2). It would be superfluous to

apply the 'reasonable restriction' jurisprudence to the organiser even though it may be seen to be an indirect way to discourage peaceful assembly. However, the sting of the 10-day notice would be absent if the penal sanction was removed and the restriction or condition stood similar to conditions stated in s. 6 of the PAA which had no penal sanction. (para 151)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang ahli Dewan Undangan Negeri bagi parti pembangkang, dituduh di Mahkamah Sesyen kerana menganjurkan perhimpunan aman di dalam stadium tanpa memberikan notis kepada Ketua Polis Daerah ('OCPD') yang berkaitan, sepuluh hari sebelum tarikh perhimpunan diadakan. Keperluan notis 10 hari tersebut terkandung dalam s. 9(1) Akta Perhimpunan Aman 2012 ('APA'), yang mana s. 9(5) memperuntukkan bahawa seseorang yang melanggar s. 9(1) melakukan satu kesalahan yang membawa hukuman denda tidak melebihi RM10,000. Perayu telah memaklumkan kepada OCPD mengenai perhimpunan tersebut pada hari ia diadakan. Perhimpunan itu sendiri berjalan tanpa apa-apa kejadian. Berikutan pertuduhan terhadapnya, perayu memohon kepada Mahkamah Tinggi untuk mengisytiharkan bahawa s. 9(1) dan 9(5) APA adalah batal dan tidak sah dan tidak berperlembagaan, bahawa pertuduhan terhadapnya dibatalkan dan dia dilepaskan dan dibebaskan daripada pertuduhan tersebut. Mahkamah Tinggi menolak permohonannya sekaligus membangkitkan rayuan ini. Perayu antara lain berhujah bahawa kedua-dua s. 9(1) dan 9(5) APA wajar dibatalkan kerana *ultra vires* Perlembagaan Persekutuan ('Perlembagaan') atas alasan: (i) keperluan untuk notis sepuluh hari adalah sekatan yang tidak munasabah atas hak warganegara yang dijamin perlembagaan untuk berhimpun secara aman kerana ia menghalang sama sekali perhimpunan secara spontan dan segera; dan (ii) walaupun sekatan dalam s. 9(1) adalah munasabah, ia adalah salah dari segi undang-undang dan perlembagaan untuk menjadikan pelanggarannya sebagai jenayah.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu)
Oleh Mohamad Ariff Yusof HMR:

(1) Tidak ada peruntukan dalam APA yang menyatakan bahawa perhimpunan yang diadakan tanpa memberikan notis awal yang diperlukan adalah dengan sendirinya tidak sah. Apa yang pada asasnya adalah sah, tidak boleh, pada masa yang sama, menjadi

A tindakan tidak sah oleh penganjur disebabkan oleh kegagalan atau ketinggalan pentadbiran. Dikotomi sebegitu adalah tidak rasional dari segi undang-undang. Kesan memutuskan bahawa s. 9(5) sebagai sah adalah memutuskan penganjur perhimpunan bertanggungan secara jenayah walaupun perhimpunan itu
B sendiri adalah secara aman dan terdapat pematuhan penuh dengan terma-terma dan syarat-syarat yang dikenakan. Jawapan perundangan adalah secara keseluruhannya tidak seimbang dengan objektif perundangan.

C **(2)** Sebaliknya, s. 9(1) adalah berperlembagaan. Tidak boleh dikatakan bahawa s. 9(1) tidak boleh melepasi syarat perlembagaan sebagai 'sekatan munasabah'. Bukanlah kuasa mahkamah untuk menyatakan sama ada notis sepuluh hari sepatutnya disingkatkan atau bahawa undang-undang mesti
D mengakui hak rakyat untuk mengadakan perhimpunan segera bagi menyuarakan bantahan mereka. Tempoh notis adalah perkara yang pada asasnya merupakan polisi perundangan. Mahkamah, dalam menguji keperlembagaan tindakan perundangan, tidak boleh menggantikan pendapat mereka
E sendiri mengenai apa yang sepatutnya menjadi polisi yang wajar. Kuasa mahkamah adalah untuk menentukan kesahan sesuatu tindakan yang dihakimi terhadap standard, prinsip-prinsip dan kaedah-kaedah undang-undang yang sepatutnya.

F **(3)** Atas fakta rayuan dan undang-undang, s. 9(1) dan 9(5) boleh dipecahkan memandangkan kedua-duanya tidak saling berkait. Oleh itu, walaupun memberikan notis awal sepuluh hari adalah masih diperlukan, apa-apa ketidakpatuhan oleh pihak penganjur tidak akan dengan sendirinya mengundang hukuman jenayah.

G **Oleh Mah Weng Kwai HMR (menyetujui):**

(1) Seksyen 9(5) APA adalah *ultra vires* per. 10 Perlembagaan kerana menjadikan sesuatu pelanggaran sekatan di bawah s. 9(1) sebagai jenayah dan dengan itu tidak berperlembagaan.
H Perkataan 'sekatan' digunakan beberapa kali dalam Perlembagaan misalnya, dalam per. 67, 111, 112, 127, 135 dan 151 (berkaitan dengan kuasa-kuasa kerajaan, perundangan dan Parlimen) dan juga dalam per. 9 dan 10 berkaitan dengan kebebasan asasi. Tetapi tidak ada apa-apa dalam perkara-
I perkara tersebut yang menyarankan bahawa pelanggaran 'sekatan-sekatan' tersebut akan membingkas pendakwaan atau hukuman jenayah. Oleh itu, tafsiran yang konsisten adalah bahawa perkataan 'sekatan-sekatan' tidak bermaksud kuasa untuk menjadikan pelanggaran tersebut sebagai jenayah.

(2) Kedudukan yang tidak konsisten dan tidak selari yang diwujudkan oleh s. 9(1) dan 9(5) APA adalah bahawa sementara seseorang ahli perhimpunan aman yang diadakan tanpa notis sepuluh hari tidak melakukan apa-apa kesalahan, penganjur perhimpunan akan bertanggungan dari segi jenayah di bawah s. 9(5) kerana tidak memberikan notis sepuluh hari.

(3) Hak untuk perhimpunan aman yang sepatutnya termasuk hak untuk menganjurkan perhimpunan aman, hanya boleh disekat secara munasabah dan bukan dilarang. Untuk menjadi 'sekatan yang dibenarkan' dalam skop per. 10(2)(b) Perlembagaan, ia mestilah munasabah dan perlu ada kaitan yang munasabah di antara keperluan bagi notis sepuluh hari dan objektif untuk mengekalkan ketenteraman awam atau keselamatan dalam Persekutuan atau mana-mana bahagiannya. Responden gagal menunjukkan bagaimana kegagalan memberikan notis sepuluh hari akan semestinya menyebabkan ancaman kepada keselamatan negara atau ketenteraman awam. Perhimpunan dalam kes ini diadakan dalam stadium pada waktu malam yang tidak menjejaskan perjalanan kehidupan seharian atau menghalang lalu lintas. Ia adalah perhimpunan statik dan bukan suatu perarakan atau demonstrasi jalanan.

(4) Sekatan yang dikenakan oleh s. 9(1) dan 9(5) APA adalah tidak munasabah kerana ia membentuk halangan yang berkesan terhadap perhimpunan segera dan spontan. Adalah mustahil bagi penganjur untuk menganjurkan perhimpunan secara spontan tanpa ancaman pendakwaan. Tidak ada peruntukan dalam APA bagi apa-apa pengecualian walaupun keperluan untuk perhimpunan diperlukan dengan segera. Walau bagaimanapun, s. 9(1) secara bersendirian, tanpa kesalahan dan penalti di bawah s. 9(5), tidak mempunyai kesan menghalang perhimpunan yang segera dan secara spontan. Dengan itu, s. 9(5) sepatutnya diasingkan daripada keperluan notis dalam s. 9(1) dan dibatalkan kerana tidak berperlembagaan.

Oleh Hamid Sultan Abu Backer HMR (menyetujui):

(1) Tidak ada langsung peruntukan bagi sesiapa yang berhimpun secara aman dan tanpa senjata untuk dituduh bagi apa-apa kesalahan di bawah APA. Jika perhimpunan itu sendiri adalah aman, maka hukuman jenayah terhadap penganjur tidak akan melayakkannya kepada perlindungan yang dikehendaki, iaitu sebagai mempunyai kaitan langsung atau hampir kepada per. 10(2) Perlembagaan.

(2) APA memberikan hak untuk setiap orang berhimpun sama ada notis diberikan atau tidak. Untuk menjadikan sebagai jenayah kerana tidak memberikan notis dan menghukum penganjur adalah tidak mempunyai kaitan dengan 'ketenteraman awam' atau 'kepentingan keselamatan Persekutuan' kecuali perhimpunan tersebut tidak aman. Seksyen 9(5) gagal melepasi 'ujian munasabah' dan juga 'ujian perkadaran' kerana tidak mempunyai kaitan dengan 'ketenteraman awam', 'keselamatan Persekutuan' dan/atau perhimpunan yang bukan secara aman. Beban adalah pada Negara untuk memuaskan mahkamah bahawa pengenaan sekatan-sekatan adalah bukan hanya demi kepentingan keselamatan Persekutuan atau ketenteraman awam malah memuaskan ujian kemunasabahan dan terangkum ke dalam ruang litup per. 10(2) Perlembagaan.

(3) Perkara 10 tidak menjadikan pelanggaran sekatan sebagai jenayah. Adalah salah untuk membaca per. 10 sebagai menyatakan bahawa jika terdapat pelanggaran sekatan maka perlu ada hukuman jenayah, lebih-lebih lagi apabila sekatan tersebut *per se* tidak berkait langsung dengan perhimpunan. Sekatan-sekatan tersebut adalah bersifat prosedur dan/atau pertadbiran. Perangka-perangka Perlembagaan tidak memperuntukkan hukuman jenayah atau mewujudkan enakmen untuk hukuman jenayah bagi pelanggaran sekatan-sekatan. Kanun Keseksaan, Kanun Tatacara Jenayah dan undang-undang spesifik iaitu mempunyai hukuman jenayah yang mencukupi untuk memastikan 'undang-undang dan keamanan', 'ketenteraman awam', 'keselamatan Persekutuan', 'ketenangan awam' dan lain-lain.

(4) Mempertimbangkan ujian tegar berkaitan dengan 'sekatan munasabah', notis sepuluh hari bukanlah berlebihan atau melanggar per. 10(2) kerana ia tidak menghalang orang awam daripada berhimpun secara aman dan tanpa senjata pada bila-bila masa, siang atau malam. Notis sepuluh hari yang penganjur perlu berikan tidak berkait langsung dengan per. 10(2). Adalah tidak diperlukan untuk menggunakan jurisprudens 'sekatan munasabah' kepada penganjur walaupun ia mungkin dilihat sebagai cara tidak langsung untuk menghalang perhimpunan aman. Walau bagaimanapun, sengatan notis sepuluh hari tidak akan wujud jika hukuman jenayah dikeluarkan dan sekatan atau syarat dijadikan serupa dengan syarat yang dinyatakan dalam s. 6 APA yang tidak mempunyai apa-apa hukuman jenayah.

Case(s) referred to:

Babulal Parate v. State of Maharashtra (1961) 3 SCR 423 ***(refd)***

Chai Kheng Lung v. Inspector Dzulkarnain Abdul Karim & Anor [2009] 7 CLJ 133 ***(refd)***

Chintaman Rao & Anor v. State of Madhya Pradesh 1951 AIR 118 SC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***

Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; 1984 1 CLJ (Rep) 98 FC ***(refd)***

De Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others [1998] UKPC 30 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***

Hubbard v. Pitt [1976] QB 142 ***(refd)***

Kameshwar Prasad and Ors v. The State of Bihar and Anor 1962 AIR 1166 SC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(foll)***

Nik Noorhafizi Nik Ibrahim & Ors v. PP [2014] 2 CLJ 273 CA ***(refd)***

Om Kumar & Ors v. Union of India AIR 2000 SC 3689 ***(refd)***

PP v. Bird Dominic Jude [2013] 8 CLJ 471 CA ***(refd)***

PP v. Cheah Beng Poh, Louis & Ors & Anor [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383 HC ***(refd)***

PP v. Karpal Singh Ram Singh [2012] 5 CLJ 580 CA ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***

R v. Oakes (1986) 26 DLR (4th) 200 ***(refd)***

R (Daly) v. Secretary of State for the Home Department [2001] UKHL 26 ***(refd)***

Ram Krishna Dalmia v. Shri Justice SR Tendolkar and Ors 1958 AIR 538 SC ***(refd)***

Re Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India & Ors ***(refd)***

RMD Chamarbaugwalla v. The Union of India 1957 AIR 628 SC ***(refd)***

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***

Siva Segara Kanapathi Pillay v. PP [1984] 2 CLJ 95; [1984] 1 CLJ (Rep) 353 FC ***(refd)***

Sivakumar v. State of Tamilnadu [2013] 7 MLJ 395 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors [2005] 8 SCC 534 ***(refd)***

A *The Government of the State of Kelantan v. Government of the Federation of Malaya And Tunku Abdul Rahman Putra Al-Haj [1963] 1 LNS 145 HC* ***(refd)***
Vishaka v. State of Rajasthan AIR 1997 SC 3011 ***(refd)***
Yong Kar Mun v. PP [2013] 5 CLJ 751 CA ***(refd)***

B **Legislation referred to:**
Federal Constitution, arts. 4(2)(b), 10(1)(b), (2)(a), (b), (c), 67, 111, 112, 127, 135, 149, 151
Legal Profession Act 1976, s. 46A(1)
Peaceful Assembly Act 2012, ss. 2, 6, 7, 8, 9(1), (5), 10, 11, 12, 13,
C 14, 15, 20(1), 21(1), 23
Penal Code, ss. 141, 142, 145
Police Act 1967, s. 27(5)(a), 27C
Universities and University Colleges Act 1971, s. 15(5)(a), (7)

Assembly Law [Ger], s. 14.1
D Constitution of India [Ind], art. 19
Code of Criminal Procedure [Ind], s. 144
Public Order Act 1986 [UK], s. 11(1)

For the appellant - N Surendran (Latheefa Koya, Syahredzan Johan & Melissa Sasidaran with him); M/s Daim & Gamany
E *For the respondent - Wan Shaharuddin Wan Ladin (Mohd Fairuz Johari with him); DPPs*

[Appeal from High Court, Shah Alam; Criminal Appeal No: 44(A)-75-08-2013]

F *Reported by Ashok Kumar*

JUDGMENT

G **Mohamad Ariff Yusof JCA:**

Introduction

[1] In writing this separate judgment, I have had the privilege
H and advantage of reading and considering the draft decisions of my learned brothers, Mah Weng Kwai, JCA and Hamid Sultan bin Abu Backer, JCA. We have agreed to write separate decisions for this appeal since the constitutional issues raised in this appeal are of significant public importance, and a more detailed consideration
I of this appeal will be best achieved by the panel writing our separate decisions. This then is my separate decision.

The Factual Background

[2] The appellant in this appeal was charged in the Sessions Court, Petaling Jaya, Selangor, with an offence under s. 9(1), Peaceful Assembly Act 2012 ("PAA"), which is punishable under s. 9(5) of the same Act. This offence carries, upon conviction, the punishment of a fine not exceeding RM10,000.

[3] The charge against him reads:

> Bahawa kamu pada 8.5.2013 jam lebih kurang 8.30 malam, di Stadium Majlis Bandaraya Petaling Jaya (MBPJ), Kelana Jaya, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah didapati sebagai penganjur Perhimpunan Program Penerangan Negeri Selangor telah gagal memberitahu Pegawai yang menjaga Daerah Polis Petaling Jaya mengenai di mana perhimpunan tersebut hendak diadakan dalam tempoh masa yang ditetapkan iaitu (10) hari sebelum tarikh perhimpunan diadakan. Oleh yang demikian itu, kamu telah melakukan kesalahan di bawah seksyen 9 (1) Akta Perhimpunan Aman 2012 dan boleh dihukum di bawah seksyen 9 (5) Akta yang sama.

[4] The appellant was thus charged in his capacity as an organiser of an assembly held at Stadium Majlis Bandaraya Petaling Jaya (MBPJ) who had failed to notify the OCPD Petaling Jaya of the gathering within the time required under the PAA, namely ten days before the date the assembly was supposed to be held. This requirement of notification of the assembly is stated in s. 9(1) which reads:

> An organiser shall, ten days before the date of an assembly, notify the Officer in Charge of the Police District in which the assembly is to be held.

[5] Section 9(5) further provides:

> (5) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[6] The appellant then applied by notice of application in the High Court for an order that s. 9(1) and s. 9(5) of the PAA are null and void. Further, the appellant prayed for an order that the charge and the prosecution against him under s. 9(1) of the Act, punishable under s. 9(5), in the Sessions Court, Petaling Jaya (Kes Saman No: MS 3-63-7-5-2013) be suspended and set aside, and further to that that the High Court order that he be acquitted and released.

[7] His application was dismissed by the High Court. This present appeal is an appeal against that dismissal by the High Court.

[8] The factual background to this appeal relates to the results of the general elections held on 5 May 2013. The assembly was held three days after the results of the general elections were announced. It was a public assembly held within an indoor stadium – the Stadium Majlis Bandaraya Petaling Jaya. There is no evidence on record to suggest that the assembly in the stadium was not peaceful or unlawful. No person has to date been charged for being a member of an unlawful assembly arising from this event.

The Grounds Of Appeal

[9] Before us, the applicant through his counsel has raised two grounds for the appeal. First, the applicant argues that s. 9(1) and s. 9(5) are unconstitutional since the requirement to provide the ten days' notice for an assembly is excessive and an unreasonable restriction on the right to freedom of assembly as provided under the Federal Constitution, more exactly arts. 10(1)(b) and (2)(b). Second, the charge and the criminal proceedings against him are said to be an abuse of court process, a travesty of justice, contrary to public policy (since the appellant is a state legislative assemblyman of Selangor), is politically motivated and based on selective prosecution.

[10] The appellant is a member of Parti Keadilan Rakyat. He is in fact presently its communications director. He stood as a candidate in the 13th general elections on 5 May 2013 for the State Legislative Assembly seat of Seri Setia in Selangor, which he won. The appellant argues, he helped organised the assembly at the MBPJ Stadium, which was held on the evening of 8 May 2013, as the party's communications director. This was three days after the results of the general elections were known. This was, according to the appellant, an assembly which had to be held urgently to explain to the rakyat the various allegations of election fraud and wrongdoing brought to the attention of PKR.

[11] The appellant had notified the police by letter on 8 May 2013 itself. This letter appears as exh. NN-4 to his supporting affidavit. The notification was therefore made on the same day as the assembly. This obviously fell far short of the notice requirement of ten days as required under s. 9(1).

[12] The issue as submitted before us by the appellant is whether Parliament in enacting the PAA can prohibit a spontaneous or immediate assembly of citizens in this country. According to the interpretation adopted by the appellant, such a prohibition imposes a total prohibition on this type of assembly and therefore cannot be properly construed as a permissible restriction within the meaning of art. 10(2)(b) of our Federal Constitution.

[13] A related issue concerns whether Parliament, in attempting to impose reasonable restrictions on the right to freedom of peaceful assembly, can "criminalise" any act that transgresses such reasonable restrictions. This is the effect, arguably, of s. 9(5) of the PAA, and to that extent, so argues the appellant, it has to be regarded as violative of the Federal Constitution and null and void.

Preliminary Issues

[14] I accept that there are certain basic assumptions to be made in cases such as this instant appeal. First, it involves, first and foremost, an issue of constitutional interpretation. Second, a court, in addressing the large constitutional questions posed, has to be mindful of the parameters of judicial review, and the proper domain of the judicial function, in testing the legality of state action (to include both executive and legislative actions) against the Federal Constitution. Third, and this is more a technical juristic issue, the court has to identify and, if need be apply, only established rules and principles applicable in our constitutional law, when deciding whether to uphold or strike down, as the case may be, a concerned state action. Fourth, and this is by no means the least important consideration, the court has to be sensitive to constitutional law developments elsewhere (certainly, in Commonwealth jurisdictions at least) so as to arrive at a decision that is consonant not only with the development of our own jurisprudence, but also sits well with international standards and expectations. In constitutional law, much more so than any other areas of the law, the learning of eminent judges elsewhere in the Commonwealth, I feel, should not be ignored, for they will have much to offer to enrich our own constitutional experience. Granted that a Constitution has to be primarily interpreted within "its own four walls" (*The Government of the State of Kelantan v. Government of the Federation of Malaya And Tunku Abdul Rahman Putra Al-Haj* [1963] 1 LNS 145; [1963] MLJ 355), this principle is merely one which accords primacy to the wording of our own

A constitutional provisions. It does not exclude consideration of legal learning and relevant case authorities from other jurisdictions which can throw light and colour on our own constitutional provisions.

[15] As I indicated earlier, I have had the privilege of reading
B the judgments in draft of my learned brothers, Mah Weng Kwai, JCA and Hamid Sultan bin Abu Backer, JCA. They have each referred to relevant decisions from other Commonwealth courts with due deference. I share the same sentiment.

Rules Of Constitutional Interpretation

C

[16] Given the structure of our Constitution, all citizens of Malaysia have the right to assemble peaceably and without arms (art. 10(1)(b)), but this right is made subject to cl. (2)(b) of the same article. By this provision, Parliament "may by law" impose
D restrictions on the right of assembly "in the interest of the security of the Federation" or "public order". The restrictions are referred to as "such restrictions as it deems necessary or expedient" for these purposes.

E **[17]** Drawing on the latest pronouncements of our courts on constitutional interpretation in relation to fundamental rights (*Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; *PP v. Cheah Beng Poh, Louis & Ors & Anor*
F [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383; *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ
G 507; and most recently, *Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273, I am mindful of the general principles on constitutional interpretation that the Constitution is a *sui generis* document whose provisions should be read broadly and purposively in a way as to advance the protection of fundamental
H rights, and limit only to the extent necessary, legislative and executive qualifications or encroachments on these rights. The ultimate goal is to prevent arbitrary legislative and executive action, to preserve the rule of law and maintain and preserve the principle of constitutionalism or limited government in a democratic system
I of government.

[18] As for the case authorities on general principles of interpretation, there is general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity. The earlier case authority of *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; 1984 1 CLJ (Rep) 98; [1981] 1 MLJ 29 remains very relevant in laying down the first principles of constitutional interpretation. I refer in particular to the following passage in the judgment:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136. It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[19] See also similar principles being repeated by the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 3 CLJ 507:

> In three recent decisions this Court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521, *Lee Kwan Woh v. Public Prosecutor* [2009] 1 LNS 778 and *Shamim*

A *Reza v. Public Prosecutor* [2009] 6 CLJ 93. The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept. (per Gopal Sri Ram, FCJ at page 514)
B

[20] This "ambulatory" or "prismatic" approach to a broad constitutional interpretation when applied in the context of art. 10 of the Federal Constitution, allowed the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri, supra*, to interpret
C art. 10(2) as interposing the word "reasonable" before the word "restrictions". See eg, the passage reading:

... the restrictions which Article 10 (2) empower Parliament to impose must be reasonable restrictions. In other words, the word
D "reasonable" must be read into the sub-clauses of Art.10 (1) ... (per Gopal Sri Ram, JCA (as his lordship then was) at page 29 of the report)

[21] These accepted principles were analysed in depth by the Federal Court in *Lee Kwan Woh*, *supra*, and the following passage
E in the judgment bears repeating:

In the first place, the Federal Constitution is the supreme law of the Federation. Though by definition it is a written law (see s. 66 of the Consolidated Interpretation Acts of 1948 and 1967)
F it is not an ordinary statute. Hence, it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes. Indeed, it would be misleading to do so. As Lord Diplock said in *Hinds v. The Queen* [1976] 1 All ER 353 at p 359:

G To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in Their Lordships' view, be misleading ...

... In the second place, the Constitution is a document *sui generis*
H governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt
I a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. ...

... In the recent case of *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 2 MLJ 285, this court in the judgment of Hashim Yusoff, FCJ approved, *inter alia*, the following passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213:

> The long and short of it is that our Constitution especially those articles in it that confer on our citizens the most cherished of human rights must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become. (at pages 638 - 641 of the report)

[22] The timely reminder by Hashim Yusof, FCJ not to read the Constitution "as a last will and testament" resonates with the views expressed by the Hon. Justice Michael Kirby of the High Court of Australia in his Hamlyn Lectures (55th series), *Judicial Activism: Authority, Principle and Policy in the Judicial Method*. It will be useful to consider the legal learning here, and I quote:

> This is an approach to the task of constitutional interpretation identical to my own. It derives from the essential function which a written constitution is expected to fulfil. Construing a constitution with a catchcry about "legalism", with nothing more than judicial case books and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it as their basic law, is a contemptible idea. As one anonymous sage once put it: if you construe a constitution like a last will and testament, that is what it will become ... Nevertheless, legal reasoning, unlike political activism, must always remain attached to legal authority ...

The reference to legal reasoning having to be remain attached to legal authority is a pertinent comment on the limits of judicial review.

Subsidiary Rules Of Interpretation And The Presumption Of Constitutionality

[23] I have mentioned above the general principles of constitutional interpretation. These indicate an approach, but in order to decide whether a particular state action is consonant with the Constitution or otherwise, further subsidiary rules are required to complement these. These subsidiary rules of interpretation are particularly important when the challenged state action is in the nature of a legislative action, meaning a statute enacted by

A Parliament is being challenged as inconsistent with the Constitution and therefore void to the extent of the inconsistency. The facts of this appeal are directly concerned with judicial review of legislative action.

B **[24]** These subsidiary rules have not received the attention of courts with the same degree of analysis as the earlier mentioned general principles of interpretation. It is here that we should turn to learned commentaries on the subject, and , for my part, I feel I can do no better than to cite and approve the carefully C reasoned treatment that this subject has received by the learned Indian author, HM Seervai in his treatise, *Constitutional Law of India: A Critical Commentary* (4th edn.). I propose to cite the relevant extracts from this bold work, which I do below:

D (1) There is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity'.

E (2) Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of the law upheld ...

(3) The Court will not decide constitutional questions if a case F is capable of being decided on other grounds.

(4) The Court will not decide a larger constitutional question than is required by the case before it.

(5) The court will not hear an objection as to the G constitutionality of a law by a person whose rights are not affected by it.

(6) A statute cannot be declared unconstitutional merely because in the opinion of the court it violates one or more of the principles of liberty or the spirit of the Constitution, unless H such principles and that spirit are found in the terms of the Constitution ...

(7) In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into I law is within the scope of the power conferred on a Legislature and violates no restriction on that power, the law must be upheld whatever the court may think of it. See pages 261-261 of the text.

[25] As can be appreciated from the subsidiary rules of constitutional interpretation, the power of judicial review over legislative action should be sparingly exercised, since there is a strong presumption of constitutionality which can be readily explained as premised on the principle that Parliament could not be presumed to intend an unconstitutional action. The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Its domain is the testing of legality, not the wisdom or unwisdom of legislative action. I propose to adopt such an approach when evaluating the constitutionality of the challenged provisions below.

Doctrine Of Severance

[26] An allied principle following from the rules and principles noted above, is the principle that where two interpretations are possible – one in favour of validity, and the other against it – the court should sever the good from the bad, where this is possible. This doctrine of severance will limit the invalidation of a law only to the extent necessary. HM Seervai, *supra*, comments thus:

> ... where two interpretations are possible, a Court will accept that interpretation which will uphold the validity of the law. If, however, this is not possible, it becomes necessary to decide whether the law is bad as a whole, or whether the bad part can be severed from the good part. The question of construction and the question of severability are thus two distinct questions ... (page 266 of the text)

Whether Section 9(1) And (5) Valid As Imposing Reasonable Restrictions

[27] I now proceed beyond a consideration of the rules of interpretation and its doctrinal underpinnings, to now analyse and assess whether s. 9(1) and (5) offend art. 10 of the Federal Constitution, with its guarantee that "All citizens have the right to assemble peaceably and without arms", subject to cl. (2)(b).

[28] I have borne in mind the specific wording of art. 10(2)(b) which allows Parliament to pass a law imposing on the right to assemble peaceably and without arms "such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order." I have also

considered the effect of art. 4(2) which, at first blush, seems to exclude judicial review of legislative action by our courts. To quote art. 4(2):

> (2) The validity of any law shall not be questioned on the ground that:
>
> (a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or
>
> (b) It imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

[29] Having considered the provision, in my view art. 4(2) does not purport to completely oust judicial review by the courts. It merely proscribes any challenge of a law only on the ground that the law imposing the restrictions is not deemed necessary or expedient by Parliament. It does not bar the courts from questioning whether such law, although deemed necessary or expedient by Parliament, has purported to impose such restrictions which are bad in law, in the sense of being unreasonable in a constitutional sense. The Deputy Public Prosecutor, who argues this appeal for the respondent, appears to concede that despite art. 4(2), the court can still question on the narrower ground of whether the law is passed for any of the 'interests set out in the clause", and cites *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566.

[30] I have earlier referred to the decisions of our courts in *Sivarasa Rasiah v. Badan Peguam Malaysia*, *supra*, and *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri*, *supra*, as requiring laws passed imposing fetters on the right of peaceable assembly under art. 10 to satisfy the test of "reasonable restrictions". Nevertheless, I accept that there cannot be hard and fast rules on what could be construed as "reasonable" restrictions. Much will depend on the subject matter and context. The law, nevertheless, provides the principles and standards against which to test the legality or constitutionality of legislative or executive action, which can be found authoritatively expressed in the cases. The Deputy Public Prosecutor has referred to one such case, ie, the Supreme Court of India decision in *Om Kumar & Ors v. Union of India* AIR 2000 SC 3689. It was argued that s. 9(1) and s. 9(5) of the PAA are reasonable restrictions in the interest of preserving "public order".

These provisions, it is argued, are not excessive in character and are proportionate to the needs of public order. It would appear from the submissions of the parties that there is acceptance of the proportionality principle being a component of the constitutional concept of "reasonableness." Counsel for the respondent accepts that the principle of proportionality has been applied by courts to test the validity of laws imposing restrictions on fundamental rights. The relevant part in *Om Kumar & Ors v. Union of India, supra*, cited and highlighted before us reads:

> By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or administrator so as to achieve the object of the legislation of the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and administrate authority maintain a proper balance between the adverse effects which the legislation or administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.

[31] *Om Kumar, supra*, also cites with approval the analysis of this principle by the Canadian Supreme Court in the case of *R v. Oakes* (1986) 26 DLR (4th) 200, where 'three important components of the proportionality test' are stated. These are of some relevance on the facts of the present appeal as indicating what could be a proper juristic basis to consider how to apply the concept of "reasonable restrictions". As analysed in *Om Kumar*, *supra*, these components are stated as follows:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be "proportionality" between the effects of measures and the objectives ...

[32] To summarise, these "components" require a rational connection between "measures" taken and the "objective", which should cause minimal impairment of the particular freedom in issue,

A and the effects of the measures taken and the objective must be proportionate. The measures taken must also impair as little as possible the fundamental right in question.

[33] The current UK position shares similarities with the above
B exposition of the law. The opinion of the Privy Council in *de Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* [1998] UKPC 30 is illustrative. This case was referred to and approved by our Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia*, *supra*. To
C quote the relevant passage in *de Freitas*, *supra*, as subsequently approved and applied in *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26:

> In determining whether a limitation is arbitrary or excessive ... the Court would ask itself:
>
> D
>
> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right, (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
>
> E

To put it in brief terms, the legislative or executive response must have a rational basis (the "rational nexus" test) and must be proportionate to the objective.

F **[34]** The reasonableness of the restrictions imposed on the right to freedom of peaceable assembly has to be tested according to this legal standard. This standard of legality is broader than what has been traditionally regarded as the "Wednesbury reasonableness" test in the sphere of general administrative law.
G The conventional "Wednesbury reasonableness" test merely requires the court to ask whether the decision maker has come to a conclusion "that no reasonable authority could have come to it." Our own Court of Appeal has applied this narrower test on the facts of *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors*, where
H s. 15(5)(a) of the Universities and University Colleges Act 1971 (UUCA) was struck down as unconstitutional. See the following passage in the majority judgment (per Linton Albert, JCA):

> I But where the legislative enactment is self explanatory in its manifest absurdity as s. 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable. What better illustration can there be of the utter absurdity of s. 15(5)(a) than

the facts of this case where students of universities and university colleges face disciplinary proceedings with the grim prospect of expulsion simply because of their presence at a Parliamentary by-election. A legislative enactment that prohibits such participation in a vital aspect of democracy cannot by any standard be said to be reasonable. In my judgment, therefore, because of its unreasonableness, s. 15(5)(a) of the UUCA does not come within the restrictions permitted under Art 10(2)(a) of the Federal Constitution and is accordingly in violation of Art 10(1)(a) and consequently void by virtue of Art 4(1) of the Federal Constitution which states:

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void. (at pp 532 - 533)

[35] However, I feel it is important to further note that the majority judgment of the court in *Muhammad Hilman*, *supra*, actually adopted the broader test in *Sivarasa Rasiah v. Badan Peguam Malaysia*, *supra*, and preferred it to the narrower approach in *Pung Chen Choon*, *supra*, as stated in the following passage in the judgment (per Linton Albert, JCA):

> With the greatest of respect, in my judgment, the correct approach would be that which was laid down in the Federal Court Case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, not least because it was a decision of our apex court after *Pung Chen Choon*, in *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 the Federal Court held that where two decisions of the Federal Court conflict on a point of law the later decision prevails over the earlier decision. There is no reason not to apply that principle where, as here, the earlier decision is that of the Supreme Court. Returning now to *Sivarasa Rasiah*, Gopal Sri Ram FCJ, delivering the judgment of the Federal Court set out the approach to be taken in determining the constitutionality of a legislative enactment like s. 15(5)(a) of the UUCA which purports to limit the freedom of expression under Art 10(1)(a) of the Federal Constitution.
>
> The other principle of constitutional interpretation that is relevant to the present appeal is this. *Provisos* or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take Art 10(2)(c). It says that 'Parliament may by law impose ... (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the

A proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view
B expressed by the High Court in *Nordin bin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors* [1992] 1 CLJ 343; [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of Art. 10(2), the question for determination is whether the
C restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article. (at pp. 529 - 530 of the report)

[36] For my part, I would fully endorse and have no hesitation
D to apply the same approach and principles as carefully laid down by the majority judgment in *Muhammad Hilman*.

[37] In a similar vein, I would also agree and apply the test, as did the Court of Appeal in *Muhammad Hilman*, that in testing the validity of the state action with regard to fundamental rights, what
E the court must consider is whether that state action directly affects the fundamental rights, or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory, namely the standard posited by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v.*
F *Nordin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72; [1992] 1 MLJ 697.

Analysis And Application Of The Law

[38] I now proceed to consider and evaluate s. 9(1) and s. 9(5)
G of the PAA against the principles analysed above. The question to be answered is whether, objectively read, these provisions have a rational connection to the statutory objectives, and whether they could be said to be proportionate to these legislative objectives.
H In keeping with the accepted approach to constitutional interpretation in relation to judicial review of legislative action, the presumption of constitutionality has to be borne in mind. The statutory objectives as found in the preamble and s. 2 of the PAA read:

I An Act relating to the right to assemble peaceably and without arms, and to provide restrictions deemed necessary or expedient relating to such right in the interest of the security of the

Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons, and to provide for related matter.

2. The objects of this Act are to ensure:

(a) so far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies, peaceably and without arms; and

(b) that the exercise of the right organize assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons.

[39] The PAA has carefully defined and delineated the various responsibilities of the "organisers", "participants" and the police. See ss. 6, 7 and 8. It also provides a procedure for notification of a proposed assembly to the public (or persons having interests) and the right to raise objections and allows the police to take such measures as necessary to ensure the orderly conduct of the assembly. See ss. 9 to 15.

[40] Objectively evaluated, can it be concluded that the rationale for the requirement for prior ten days' notice has a rational and reasonable basis, or is it also proportionate to the legislative objectives? For me, I tend to be of the view that this particular provision, namely s. 9(1) cannot be said not to pass constitutional muster as a "reasonable restriction." It is not, I feel, the domain of the court to stipulate whether the ten days' notice should be shorter, or, for that matter that the law must recognise a right to have an immediate assembly for the rakyat to voice out their dissent. Length of notice is a matter ultimately of legislative policy. This law was debated extensively in Parliament, and the original notice period was in fact reduced. The courts in testing the constitutionality of legislative action cannot substitute its own view on what ought to be the proper policy. The domain of the courts is the determination of legality of an action judged against proper legal standards, principles and rules. It is in this sense that the legal concepts of reasonableness and proportionality have to be understood and applied. I am therefore of the view, and I so find accordingly, that s. 9(1) of the PAA is constitutional.

[41] Turning now to s. 9(5), I must confess some conceptual difficulty to accept the proposition that a public assembly remains a valid assembly although the ten days' prior notice has not been given, and the corresponding proposition that the organiser of an assembly, otherwise lawful, must nevertheless be criminally punished for failing to apply within the ten days prior to the holding of the assembly. There is no provision in the PAA which stipulates than an assembly held without the requisite prior notice is *per se* unlawful. The nearest relevant provisions, ie, ss. 10, 23 14, 15, 20 and 21 relate to matters on restrictions and conditions which may be imposed by the officer in charge of the police district, the effects of a failure to comply with restrictions and conditions and enforcement powers generally. These are provisions which address not merely the "organiser" but also "any person", or both "organiser" and "participant". See for instance, s. 15 of the PAA:

> Restrictions and conditions
>
> 15. (1) The Officer in Charge of the Police District may impose restrictions and conditions on an assembly for the purpose of security or public order, including the protection of the rights and freedoms of other person.
>
> (2) The restrictions and conditions imposed under this section may relate to:
>
> (a) the date, time and duration of assembly;
>
> (b) the place of assembly;
>
> (c) the manner of the assembly;
>
> (d) the conduct of participants during the assembly;
>
> (e) the payment of clean-up costs arising out of the holding of the assembly;
>
> (g) the concerns and objections of persons who have interest; or
>
> (h) any other matters the Officer in Charge of the Police District deems necessary or expedient in relation to the assembly.
>
> (3) Any person who fails to comply with any restrictions and conditions under this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[42] These provisions do not *per se* render unlawful an assembly held without with the prior ten days' notice, or held with a shorter notice period. Thus, that which is fundamentally lawful cannot in the same breath result in an unlawful act on the part of the organiser by reason of an administrative failure or omission. To my mind, such a dichotomy is irrational in the legal sense, and even if it were to be regarded as somehow rational, or does not offend the legal test of conventional unreasonableness, the legislative response is wholly disproportionate to the legislative objectives. To say so is not to transgress into the domain of the legislature or to disturb a conscious policy decision of the legislature. The court in coming to such a view is merely exercising its traditional constitutional function of judicial review by testing the legality of a legislative action, not the wisdom or unwisdom of the action.

[43] The effect of holding s. 9(5) valid will be to hold an organiser criminally liable although the assembly turns out to be peaceful or there is full compliance with terms and conditions imposed. There is absent a rational and proportionate connection between legislative measure and legislative objective. For these reasons, I tend to be of the view that s. 9(5) cannot be said to be constitutional.

[44] I have discussed in the earlier part of my judgment the doctrine of severance. In my considered view, on the facts of this appeal and on the law, the two challenged provisions (s. 9(1) and s. 9(5)) can be severed since both are not incontrovertibly intertwined. Thus, I am of the view that s. 9(1) is constitutional, but s. 9(5) must be held as *ultra vires* the Federal Constitution and therefore *ipso facto* null and void.

[45] In the upshot, the effect of my finding and application of the severance principle means that while the prior notice of ten days still requires to be given, any non-compliance on the part of the organiser will not attract a criminal penalty *per se*. I do not believe it can be argued from this premise that any non-compliance can always therefore be committed with impunity. Aside from ss. 14, 15, 20 and 21 of the PAA earlier mentioned, the reach of the criminal law through ss. 141, 142 and 145 of the Penal Code on unlawful assembly will be ever present to punish organisers and participants of an assembly which runs foul of these provisions. With respect, this will be the proper and legitimate legislative

response to the legislative objectives, not to immediately criminalise an organiser who fails to give the ten days' prior notice, or provides a prior notice less than the stipulated ten days.

[46] The constitutionality ground is the plank of this appeal. The second ground, ie, selective prosecution and abuse of process is less exact, and much depends on evidence. However, given the finding on unconstitutionality of s. 9(5), this ground of appeal becomes immediately redundant.

Conclusion

[47] In conclusion, and for the reasons discussed above, I am in favour of allowing this appeal.

[48] I would order that the order of the High Court dated 1 November 2013 dismissing the applicant's notice of application be set aside. Consequently, I would order that the applicant's notice of application dated 21 August 2013 be allowed in terms of para. (1) to the extent of ordering that s. 9(5) of the PAA is null and void, (2) that the charge and prosecution against the applicant in Kes Saman No: MS3-63-7-5-2013 under s. 9(1) PAA, read in conjunction with s. 9(5) of the same, be set aside; and (3) that the applicant be acquitted and discharged, as prayed.

Mah Weng Kwai JCA:

Brief Facts

[49] The 13th general elections of Malaysia were held on 5 May 2013.

[50] Barisan Nasional (BN) won the majority of seats and formed the Federal Government.

[51] Parti Keadilan Rakyat ("PKR") organised an assembly known as "Program Penerangan Negeri Selangor" on the evening of 8 May 2013 at Stadium Majlis Bandaran Petaling Jaya, Kelana Jaya, Selangor, to inform the general public and electorate of its plans to address the alleged widespread election fraud and wrongdoings during the general elections.

[52] The appellant, as PKR's communications director, was the organiser of the assembly and had informed the police of the assembly by letter dated 8 May 2013.

[53] The assembly was held peacefully on the evening of 8 May 2013 with no untoward incident reported. A

[54] On 16 May 2013, the appellant was served with a police summons and charged in the Petaling Jaya Sessions Court on 17 May 2013 for an offence under s. 9(1) and punishable under s. 9(5) of the Peaceful Assembly Act 2012 ("the PAA") for failing, as the organiser of the assembly, to give ten days notice of the intended assembly to the Ketua Polis Daerah, Petaling Jaya. B

[55] The appellant applied to the Shah Alam High Court for an order to declare ss. 9(1) and 9(5) of the PAA null and void; the charge against him in the Petaling Jaya Sessions Court be set aside/suspended or struck out and that thereafter the appellant be acquitted and discharged. C

[56] The learned High Court Judge on 1 November 2013 dismissed the application on the grounds that s. 9(1) of the PAA is not unconstitutional and that there was no selective prosecution instituted against the appellant. D

[57] Being dissatisfied with the decision of the learned High Court Judge, the appellant filed his notice of appeal on 7 November 13 to the Court of Appeal. E

The Appellant's Case

[58] The grounds in the affidavit in support of the appellant's application in the High Court are essentially as follows: F

(i) Sections 9(1) and 9(5) of the Act are unconstitutional as the requirement to provide 10-days notice for an assembly is excessive and an unreasonable restriction to the right to freedom of assembly as provided under the Federal Constitution. G

(ii) The criminal proceedings against the Appellant is an abuse of the court process and a travesty of justice.

(iii) The charge against the Appellant is contrary to public policy as the Appellant is a State Legislative Assemblyperson and an opposition politician and was carrying out his duties to the people and the country in good faith. H

(iv) The charge against the Appellant is politically motivated, selective prosecution, made in bad faith and undermines the rule of law. I

A **The Respondent's Position**

[59] Not surprisingly, the respondent's position was entirely opposite to the appellant's contentions. The respondent argued that s. 9 of the PAA is constitutionally valid and not *ultra vires* B the Federal Constitution and denied there was selective prosecution.

The Appeal In The Court Of Appeal

[60] At the hearing, counsel for the appellant submitted that the C only issue to be determined in the appeal was whether ss. 9(1) and 9(5) of the PAA are unconstitutional and therefore null and void. Counsel informed the court that he would not be "pushing" the issue of alleged selective prosecution namely, that the charge was an abuse of the court process, a travesty of justice, politically D motivated and in bad faith, as the issue would be rendered redundant if the court was with the appellant on the constitutional point.

[61] Having read the several written submissions of counsel for E the appellant and the Senior Federal Counsel for the respondent, and upon hearing counsel aforesaid, the court reserved its judgment to be delivered at a later date.

[62] My learned brothers Mohamad Ariff bin Md Yusof JCA and F Hamid Sultan bin Abu Backer JCA have written separate judgments, occasioned by the need to express our views individually due to the importance of the constitutional issues dealt with in this appeal.

Grounds Of Decision

G

Article 10(2)(b) of the Federal Constitution does not criminalise breach of 'restrictions'

[63] Before the PAA was passed, public assemblies were H regulated by ss. 27 to 27C of the Police Act 1967. Without a police permit, a rally or march of more than three people was deemed unlawful and illegal under the Police Act 1967. The police had full discretion to refuse the granting of an assembly permit. These provisions were perceived by many to curtail the freedom I of assembly guaranteed under art. 10 of the Federal Constitution.

[64] The right to assemble peacefully in Malaysia without arms is enshrined in art. 10(1) of the Federal Constitution, which provides:

> (b) all citizens have the right to assemble peaceably and without arms.

[65] After years of public criticism against ss. 27 to 27C of the Police Act 1967, Parliament revisited the laws on public assemblies. Prime Minister, Datuk Seri Najib Tun Razak during his presentation speech of the Peaceful Assembly Bill 2011 in Parliament said:

> ... sebagai memeterai waad di antara kerajaan dan rakyat, maka akan dibentangkan Rang Undang-undang Perhimpunan Aman 2011 bagi menggantikan seksyen 27, Akta Polis 1967. Di bawah rang undang-undang baru, pihak polis yang selama ini sebagai penentu izin kini berubah peranannya menjadi pengawal selia undang-undang dan pemudah cara dengan ruang lingkup kebertanggungjawaban yang lebih jelas. Serentak dengan itu, dinyatakan bahawa keperluan untuk lesen perhimpunan akan dihapuskan. – The Hansard, 24th November 2011.

[66] The preamble to the PAA sets out the purpose of the Act. It states:

> Act relating to the right to assemble peaceably and without arms, and to provide restrictions deemed necessary or expedient relating to such right in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons, and to provide for related matters.

[67] Section 2 of the PAA further states the objects of the Act. It provides:

> (a) so far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies, peaceably and without arms; and
>
> (b) that the exercise of the right to organize assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons.

[68] Reading the preamble and s. 2 of the PAA it is clear that the Act only applies to peaceful assemblies and without arms. While s. 2(b) of the PAA provides for the imposition of restriction(s) on the exercise of the right to organise an assembly, any restriction(s) on that right must be necessary or expedient in the interest of the security of the Federation or any part thereof or for public order and that it must be reasonable. (See *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19).

[69] The "restriction" in so far as notification of an assembly is concerned is provided for in s. 9 of the PAA. Section 9(1) reads as follows:

> (i) An organiser shall, 10 days before the date of an assembly, notify the officer in charge of the police district in which the assembly is held.

[70] Section 9(5) stipulates that the failure to comply with s. 9(1) is an offence. Section 9(5) reads:

> (5) a person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[71] This brings me to the question of whether the "penalty" in s. 9(5) is constitutional.

[72] It is not disputed by the appellant that the freedom of assembly enshrined in the Federal Constitution under art. 10(1)(b) may be subject to restrictions. After all, art. 10(2) clearly states that Parliament may impose restrictions on this freedom. Article 10(2)(b) provides:

> (b) on the right conferred by para (b) of clause 1, such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[73] It is also noted that art. 4(2)(b) of the Federal Constitution prevents any challenges to the "restrictions" imposed by law, as provided in art. 10(2)(b), on the basis that they are not deemed necessary or expedient by Parliament. The appellant however is not challenging ss. 9(1) and 9(5) on the point of necessity or expediency.

[74] The first and main issue here, as I see it, is whether the word "restrictions" in art. 10(2)(b) empowers Parliament to criminalise the breach of such "restrictions", as has been done in s. 9(5) of the PAA.

[75] In order to understand the word "restrictions" I start with its dictionary definition. The concise Oxford English Dictionary, 12th edn. defines a "restriction" to mean "putting a limit on; deprivation of freedom of movement or action". A

[76] I then ask: Does the power to impose a 'limit' imply the power to criminalise the excess of that limit? Does the power to 'deprive' imply the power to criminalise an act in excess? B

[77] A search through the text of the Federal Constitution reveals that the word 'restriction' is used several times. Articles 67, 111, 112, 127, 135 and 151 impose 'restrictions' on the powers of the government, legislature and Parliament. But there is nothing in these articles that seem to suggest that any breach or attempted breach of these articles by the powers that be should amount to a criminal offence. C D

[78] The word 'restrictions' in respect of fundamental liberties appears only in arts. 9 and 10 of the Federal Constitution. Again, there is nothing express in these articles that the breach of such "restrictions" ought to give rise to criminal prosecution or sanction. Therefore, a consistent interpretation would be that the word "restrictions" does not imply the power to criminalise the breach of any such "restrictions". E

[79] A complete reading of the PAA itself shows that 'restrictions' do not have to come hand in hand with criminal sanction. I am referring specifically to ss. 6 and 7 which impose 'restrictions' without creating any new criminal offences for the breach of such restrictions. Sections 6 and 7 state: F

6 Responsibilities of organizers G

(1) An organizer shall ensure that an assembly is in compliance with this Act and any other written law.

(2) For the purpose of subsection (1), the organizer shall:

(a) ensure that the organization and conduct of an assembly is not in contravention of this Act or any order issued under this Act or any other written law; H

(b) ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or do anything which will disturb public tranquility; I

A (c) ensure that he or any other person at the assembly does not commit any offence under any written law;

(d) ensure that the organization and conduct of an assembly is in accordance with the notification of assembly given under subsection 9(1) and any restrictions and conditions B which may be imposed under section 15;

(e) appoint such number of persons as he thinks necessary to be in charge of the orderly conduct of the assembly;

(f) co-operate with the public authorities; C

(g) ensure that the assembly will not endanger health or cause damage to property or the environment;

(h) ensure that the assembly will not cause any significant inconvenience to the public at large; D

(i) ensure the clean-up of the place of assembly or bear the clean-up cost of the place of assembly; and

(j) in the case of simultaneous assemblies or counter assemblies, ensure that the organization of the assemblies E are not intended to specifically prevent the other assembly from taking place or interfere with the organization of such assembly.

7 Responsibilities of participants

F A participant shall

(a) refrain from:

(i) disrupting or preventing any assembly;

G (ii) behaving offensively or abusively towards any person;

(iii) doing any act or making any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or doing anything which will disturb public tranquility; H

(iv) committing any offence under any written law at any assembly; and

(v) causing damage to property; and

I (b) adhere to the orders given by the police, organizer or any person appointed by the organizer to be in charge of the orderly conduct of the assembly.

[80] It cannot therefore be said that to declare s. 9(5) unconstitutional would be to remove all meaning and effect of s. 9(1). After all, nobody has alleged that ss. 6 and 7 are meaningless.

Decision

[81] In my considered view I hold that s. 9(5) of the PAA is *ultra vires* art. 10 of the Federal Constitution for having criminalised a breach of the restriction under s. 9(1) and is therefore unconstitutional.

Restriction If Any, Must Be Reasonable Not Prohibitive

[82] Any person attending or participating in any peaceful assembly does so lawfully regardless of whether the organiser has complied with s. 9(1) and given the 10-day notice of the assembly to the Ketua Polis Daerah. There is no offence committed by any person who takes part in an assembly. However, the irony is that whilst citizens can lawfully take part in a spontaneous or urgent assembly, an organiser cannot be seen to organise one without breaching the law. Therein lies the inconsistent and incongruous position of the law. A participant in a peaceful assembly held without the 10-day notice, commits no wrong whereas the organiser will be held criminally liable under s. 9(5) for not having given the 10-day notice, notwithstanding that the impugned assembly was held peacefully and without arms.

[83] I subscribe to the view that the starting point in a consideration of a constitutional provision such as art. 10 is to recognise the principle that the Federal Constitution exists to protect the rights of the citizens rather than to restrict or to whittle them down. One must be mindful of the purpose of an assembly such as the one organised by the appellant, that it was an occasion or a platform for members of the public to gather and to express their right to free speech, another fundamental right provided for under the Constitution. Also one must not forget that the appellant, besides being the organiser, is also a member of the public fully entitled to be present and be a participant in any peaceful assembly. By criminalising and punishing an organiser under ss. 9(1) and 9(5) of the PAA, it draws into sharp focus the inconsistency and inequality that it creates. The section makes a mockery of the right of the appellant to freedom of a peaceful assembly by criminalising the default in failing to give the necessary notice to the Ketua Polis Daerah.

A Consideration Of The Applicable Cases

[84] In *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50, the 'restriction' being challenged was s. 15(5)(a) of the Universities and University Colleges Act 1971 which bars students from expressing or doing anything which might reasonably be construed as expressing support for or sympathy with or opposition to any political party in or outside Malaysia. The appellants contended that this 'restriction' was invalid as it violated the constitutional guarantee of free speech and expression enshrined in art. 10(1)(a) of the Federal Constitution. The breach of this 'restriction' could result in 'disciplinary action' pursuant to s. 15(7) of the Act. In that case, the students were charged for purported breaches of disciplinary offences.

[85] This 'restriction' was found to be unreasonable by the Court of Appeal. Hishamudin Mohd Yunus JCA said:

> Any restriction imposed must be reasonable and the court had the power to examine whether the restriction so imposed was reasonable or otherwise. If the restriction was unreasonable, the impugned law imposing the restriction could be declared as unconstitutional and accordingly null and void.

[86] That case was decided by the majority on the basis that s. 15(5)(a) was unsustainable. Although there was no specific discussion on the constitutionality of s. 15(7) which creates the disciplinary offence for the breach of s. 15(5)(a), s. 15(7) naturally fell together with s. 15(5)(a). Those sections were subsequently amended by the Universities and University Colleges (Amendment) Act 2012.

[87] The word 'restrictions' in respect of art. 10 of the Federal Constitution has been considered on several occasions by the Court of Appeal and Federal Court. My reading of the word 'restrictions' does not contradict any of these decided cases.

[88] In *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, the appellant wished to be elected to the Bar Council. However, s. 46A(1) of the Legal Profession Act 1976 prohibited him from doing so because he was also an office bearer of a political party. The appellant challenged the constitutionality of the restriction in s. 46A(1) on, *inter alia*, the ground that it violates his right to association guaranteed by art. 10(1)(c) of the Federal Constitution. The court held that s. 46A(1) was a

reasonable and justifiable 'restriction' on grounds of public morality because the absence of political influence secures an independent Bar Council. Gopal Sri Ram FCJ stated that:

> Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that "Parliament may by law impose ... (c) on the right conferred by para (c) of cl. (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality." Now although the article says "restrictions", the word "reasonable" should be read into the provision to qualify the width of the proviso. ... The correct position is that when reliance is placed by the State to justify a statute under one or more of the provisions of art. 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[89] The issue considered in *Sivarasa Rasiah* was that of reasonableness of the restriction in s. 46A(1) of the Legal Profession Act 1976. As there is no criminal sanction for the breach or attempted breach of s. 46A(1) of the Legal Profession Act 1976, the question of whether art. 10(2)(c) implies the power to criminalise the breach of imposed restrictions did not arise.

[90] In *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia (supra)* the Court of Appeal held that the derogation "restrictions" should be read as "such reasonable restrictions". In this case, it was stated that:

> It is to be noted that art. 10(2)(c) uses the formula "such restrictions as it deems necessary or expedient". Does it mean that Parliament is free to impose any restriction however unreasonable that restriction may be? ... The proper approach to the interpretation of our Federal Constitution is now too well settled to be the subject of argument or doubt. It is to be found in the joint dissent of Lord Nicholls of *Birkenhead* and Lord Hope of *Craighead* in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46:
>
> > It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to

A be given 'strict and narrow, rather than broad, constructions': see *The State v. Petrus* [1985] LRC (Const) 699, 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughes* [2002] 2 AC 259, 277, para 35.

B **[91]** More than 20 years earlier, in *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; 1984 1 CLJ (Rep) 98, Raja Azlan Shah Ag LP (as His Royal Highness then was) expressed the same view:

C In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of* D *Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a E legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the F process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in G *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.

[92] It is in the light of this kind of ambulatory approach that we must construe our Constitution.

H **[93]** The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights - must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

I

[94] The court went on to state that:

> Against the background of these principles it is my judgment that the restrictions which art. 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word 'reasonable' must be read into the sub-clauses of art. 10(1).

[95] In the case of *Siva Segara Kanapathi Pillay v. PP* [1984] 2 CLJ 95; [1984] 1 CLJ (Rep) 353, the Federal Court granted leave on two questions of public interest. It was decided that knowledge and intention were essential ingredients to be established before a *prima facie* case can be said to have been made out for the finding of guilt under s. 27(5)(a) of the Police Act 1967 and that the section cannot be read without any or any proper reference to all the provisions of s. 27 of the Act. Abdul Hamid CJ (Malaya) when delivering the judgment of the Federal Court said:

> Before proceeding to construe the section, the learned Judge observed that: 'the interpretation must be such that it must meet the legislative purpose of the enactment (See *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529).' And that in the interpretation of a statute its language must be read in what seems to be its natural sense – *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 107. The learned Judge also observed that:
>
> > The court as guardian of the rights and liberties enshrined in the Constitution is always jealous of any attempt to tamper with rights and liberties ... the right in issue here ie, the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interests of security and public order ... what the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.

[96] The right to peaceful assembly, which to my mind ought to include the right to organise a peaceful assembly, can only be restricted reasonably and not prohibited. This position is clearly spelt out in art. 10(2)(b) of the Federal Constitution which speaks of "restrictions" and not "prohibitions". (See *PP v. Cheah Beng Poh, Louis & Ors & Anor* [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383).

[97] In *Sivakumar v. State of Tamilnadu* [2013] 7 MLJ 395 the High Court of Madras held that any restriction on fundamental liberties in the interests of public order must be "reasonable restriction". It is only when the situation is "volatile and law and order is problematic and risky" can the respondent be justified in imposing restrictions. In the present case there is nothing to suggest that the security situation in the Federation of any part thereof is problematic and risky, let alone volatile if any assembly is held without due notification to the Ketua Polis Daerah.

[98] To be a "permitted restriction" within the scope of art. 10(2)(b) of the Constitution, it must firstly be reasonable and there must be a rational nexus or connection between the requirement for the 10-day notice and the objective of maintaining security in the Federation or any part thereof or public order. In *Dr Mohd Nasir Hashim (supra)* the doctrine of rational nexus was described as "... not only must the legislation or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved". In the present case it has not been shown by the respondent how the requirement for the 10-day notice can effectively help in the interest of the security of the Federation or any part thereof or public order. The planned assembly was to be held in a stadium at night which would not affect daily business life nor disrupt traffic. Significantly, it was a static assembly and not a street procession or demonstration.

[99] Following the decision in *Sivarasa Rasiah* Parliament can only impose a restriction or restrictions on fundamental liberties which is or are reasonable.

[100] Sections 9(1) and 9(5) as they currently stand essentially prohibit spontaneous and urgent assemblies. The ten day notice requirement has rendered the freedom to hold spontaneous and urgent assemblies illusory.

[101] In any spontaneous or urgent assembly, as the concept suggests, it will be impossible for the organiser to have given the 10-day notice to the police. As things stand, no organiser can ever organise an assembly to be held within ten days even if he gives notice, as in the case of the appellant, without running foul of the law.

[102] The assembly organised by the appellant was an "indoor assembly" in the stadium and was not a street procession or protest. No member of the public was compelled to attend the

assembly on 8 May 2013. Each and every member present was present there voluntarily. They would not have any complaints about the traffic congestion or disruption of business activities in the vicinity of the stadium, if any and thus their "interest" in these two areas can be discounted. As for the interests of other road users and traders if affected by the assembly, their interests would be small compared to the interests of the many members of the public attending the assembly.

[103] The interest of the members of the public attending the assembly should override the countervailing interest of the road users and traders. For the PAA to require an organiser to give the 10-day notice would to my mind, not be a reasonable nexus between the right to assemble peacefully, whether spontaneously or within a short period of time, and the requirement for a 10-day notice for purposes of security and good public order. The requirement for the 10-day notice far outweighs the relative "inconvenience" caused by the occasion of the assembly and should thus be deemed "disproportionate".

[104] Should there be any traffic violations or dislocation to business activities which is unlawful or breaches of public safety and security, they can be adequately dealt with under existing laws such as the Road Transport Act 1987, the Penal Code and other relevant laws by the police and other law enforcement agencies efficiently as they are already trained personnel to deal with any exigencies.

[105] It will be useful to consider for example, the requirements under the United Kingdom Public Order Act 1986, and the Peaceful Assembly Act 1992 of Queensland, Australia.

[106] Under the UK Act, advance notice of six days must be given for a procession but not if the procession is commonly or customarily held or where it is not practicable to give any advance notice of the procession. Failure to give advance notice of a procession does not in any event attract any penal sanctions. Notice need not be given for other types of assemblies.

[107] And under the Peaceful Assembly Act of Queensland, Australia, there is a requirement for a 5-day notice for a public assembly to become an "approved assembly". However, the Queensland Act does not criminalise non notification. It only means that the relevant authority may apply to court for an order not to authorise the assembly.

[108] In Germany, s. 14.1 of the Assembly Law provides that anyone who intends to organise an open air assembly must register with the responsible authority at least two days prior to the announcement of the event and explain the nature of the event.

[109] In our situation it will be impossible for an organiser to organise a spontaneous assembly without being under threat of prosecution and there is no provision in the PAA for any exemption even if the need for the assembly is extremely urgent.

[110] Under the "proportionality concept" expounded in *Sivarasa Rasiah (supra)* it must be borne in mind that the restriction must have an objective that is sufficiently important to justify limiting the right in question; there must be a rational nexus between the restriction and the objective and the means used by the authorities must be proportionate to the objective.

[111] I agree with the submission of counsel for the appellant that before a restriction can be said to be reasonable in the interest of public order, the respondent must show that there is a direct and proximate connection between the restriction and the public order point. The respondent has not produced any evidence to show how the failure to give the 10-day notice will necessarily result in a threat to national security or public order. Under the PAA, the respondent cannot assume that without the requirement for the 10-day notice an assembly will become disorderly and non-peaceful resulting in public disorder and/or violence.

[112] The point is made that even if an assembly is completely peaceful and without any breaches of the law committed by any of the participants, yet an organiser can be penalised for failing to give the requisite notice. This, to my mind, is an unreasonable restriction and a disproportionate legislative response.

Decision

[113] I am therefore of the considered view that the restriction imposed by ss. 9(1) and (5) of the PAA is not reasonable as it amounts to an effective prohibition against urgent and spontaneous assemblies. However, s. 9(1) on its own, without the offence and penalty in s. 9(5), does not have the effect of prohibiting urgent and spontaneous assemblies. Accordingly, I hold that s. 9(5) ought to be severed from the notice requirement in s. 9(1) and struck down for being unconstitutional.

Conclusion

[114] In the result, for the reasons stated above, I will allow the appellant's appeal. The charge against the appellant in the Petaling Jaya Sessions Court is struck out and the appellant is acquitted and discharged of the same.

Hamid Sultan Abu Backer JCA:

[115] The appellant's appeal against the decision of the learned High Court Judge who refused *inter alia* to declare ss. 9(1) and (5) of the Peaceful Assembly Act 2012 ("PAA 2012") unconstitutional, came up for hearing on 23 January 2014 and 14 March 2014 and upon hearing submission we reserved judgment. Because of the constitutional importance of the case my learned brothers Mohamad Arif bin Md Yusof JCA and Mah Weng Kwai JCA have agreed to write separate judgments. This is my judgment.

Brief Facts

[116] The appellant who is an elected state assembly man was charged under s. 9(1) of the PAA 2012 which carries a punishment of fine not exceeding RM10,000 pursuant to s. 9(5) of the Act.

[117] Learned counsel for the appellant has summarised the facts leading to the charge and read as follows:

> The 13th General Elections was held on 05.05.2013.
>
> Parti Keadilan Rakat (PKR) received reports of election fraud and wrongdoings throughout the country by certain quarters and allegedly aided by the Elections Commissions.
>
> These fraud and wrongdoings were so widespread and significant that it decided the outcome of the General Elections; Barisan Nasional won the majority of seats and formed the Federal Government.
>
> A significant portion of the electorate were angry and unhappy with the results; viewing Barisan Nasional's victory as illegitimate.
>
> Pakatan Rakyat organized an urgent assembly to inform the rakyat of what they intend to do to address these alleged fraud and wrongdoings.
>
> The assembly must be held urgently and as soon as possible and cannot wait until 10 days as the issue of fraud and wrongdoing is a live issue that must be address immediately.

A Appellant, as PKR's Communications Director, informed parties of the intended assembly, including notifying the police by way of a letter on 08.05.2013.

The assembly knows as 'Program Penerangan Negeri Selangor' took place on 08.05.2013 in the evening.

B

Thereafter, on 16.05.2013 Appelant was served with a summons by the police and charged on 17.5.2013 under Section 9(1) of the Act.

[118] The appellant was charged as follows:

C

Bahawa kamu pada 8 Mei 2013 jam 8.30 malam, di Stadium Majlis Bandaraya Petaling Jaya, Jalan SS7/15 Kelana Jaya, Bandaraya Petaling Jaya di dalam daerah Petaling di dalam Negeri Selangor Darul Ehsan, di mana Program Penerangan Negeri Selangor telah diadakan, sebagai penganjur Program tersebut, kamu telah gagal memberitahu Ketua Polis Daerah Petaling Jaya sepuluh (10) hari sebelum Program tersebut diadakan, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 9(1) Aktan Perhimpunan Aman 2012 dan boleh dihukum di bawah seksyen 9(5) Akta yang sama.

D

E

[119] The petition of appeal reads as follows:

1. The learned Judge erred in law and fact in deciding that sections 9(1) read with 9(5) of the Peaceful Assembly Act 2012 were constitutional and not an unreasonable restriction to the right to assemble.

F

   (i) The said sections are outright prohibitions on any spontaneous assembly or any gathering where no 10 day notice was given.

G

   (ii) There is no reasonable nexus between the condition for a 10 day notice to assemble peacefully with safeguarding public order.

   (iii) The notice, as a prohibition, is not in any restriction allowed under article 10(2)(b) of the Federal Constitution.

H

   (iv) The said sections are unreasonable prohibitions against the right to assemble peacefully.

2. The learned Judge erred in law and fact by not adopting the legal principles enunciated in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 3 CLJ 507 and other cases to determine whether the sections are constitutional.

I

3. The learned Judge erred in law and fact by applying the case of *Mat Suhaimi bin Shafiei v. PP* (Shah Alam High Court No. 44-72-2011) even when the case had different laws and principles from that of this case.

4. The learned Judge erred in law and fact in deciding that the High Court could not 'read words into that proviso', but did not decide on the 'unambiguous meaning of the statue', that the sections are unreasonable on the right to assemble peacefully.

5. The learned Judge erred in law and fact by taking into account the confusion and/or 'difficulty to comply' in deciding whether the said sections were reasonable restrictions.

6. The learned Judge erred in law and fact in deciding that the issue of selective prosecution was added to spice up the applicant's version:

   (i) The court has the power to review any prosecution.

   (ii) The respondent's discretion to prosecute must be exercised correctly without miscarriage of justice and after taking into account all information.

   (iii) The chain of events clearly show political motives and *mala fide* behind the prosecution against the appellant.

   (iv) This was selective prosecution against the appellant as the appellant was from the opposition party, when a member of the government was not prosecuted.

   (v) The court has the power to correct a wrong when there is clear abuse or clear mistake.

   (vi) The prosecution against the appellant is against public policy.

7. The learned Judge erred in law and fact by disallowing counsel for the appellant to submit and raise issues on selective prosecution, politically motivated, abuse of process of court and against public policy.

8. The learned Judge erred in law and fact by failing to consider the reasons raised above.

9. The learned Judge erred in law and fact by making an unreasonable statement of 'adding spice to the story' although the appellant had the right to raise those issues.

[120] Sections 9(1) and (5) of the PAA 2012 read as follows:

> 9(1) An organizer shall, ten days before the date of an assembly notify the Officer in Charge of the Police District in which the assembly is to be held.
>
> 9(5) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[121] The central question before us is whether s. 9(1) and (5) of the PAA 2012 are unconstitutional and therefore null and void. And the appellant *inter alia* relies on my judgment in *Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273; [2013] 6 MLJ 660 to anchor the argument on jurisdiction of the courts as well as unconstitutionality.

Jurisprudence

[122] In *Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273; [2013] 6 MLJ 660, I have set out the jurisprudential approach and the methodology to deal with jurisdiction of the court as well as constitutional issues such as this in light of the Federal Court's decision of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 (No judicial power argument). I do not wish to repeat save to summarise as follows:

(i) Under the doctrine of constitutional supremacy, courts have judicial power of two kinds namely: (a) judicial power to review executive action ie, judicial review as in vogue in England which is based on the concept of parliamentary supremacy; (b) judicial review of constitutional powers ie, to strike down legislation and/or part thereof if it infringes on the constitutional framework; a judicial power which is not vested in the English Court under the concept of parliamentary supremacy.

(ii) The three pillars of the constitution namely the legislature, executive and the judiciary by the constitutional oath of office are required to preserve, protect and defend the constitution and that necessarily means that country is ruled by rule of law and not by rule by law, to provide *inter alia* order in the country.

(iii) When the three pillars are disabled and/or disable themselves from acting according to the sacrosanct oath of office and rule the country by rule of law within the framework of the

> constitutional guarantees by using the state machinery such as 'police' and other constitutional functionaries such as the Election Commission, the Attorney General, etc. to provide order in the country, then the fourth Pillar and/or the Supreme Pillar of the Constitution, His Majesty, the Yang Di Pertuan Agong, inclusive of the Royal Highnesses, the Rulers are entrusted to uphold the **rules of law and order in the country**. And for this purpose His Majesty is made the Supreme Commander of the Armed Forces **with no executive shackles** with the force and might of the state at the Royal Hands to check lawlessness in the state (if any) (emphasis added).

[123] In essence, in the name of 'security of the Federation' or 'public order' the legislature cannot enact provisions which will impinge on the constitutional framework without fulfilling the strict criteria set out in the constitution. The courts are obliged to ensure the law promulgated are not enacted on illusory threat of 'public order' or 'security of the Federation' by speculation or surmise, etc.; to change the character of rule of law to rule by law. In this respect the court has a sacrosanct role to play to **balance the state as well as public interest** within the framework of constitutional jurisprudence as applied in civilised nation, which are not subject to authoritarian rule. The courts' task in doing so is no easy task but when done within jurisprudence it promotes and enhances democratic values which will ensure peace, prosperity and harmony to the state and bring great economic success to the public. And it will also anchor public confidence in judicial determination (emphasis added).

[124] History has shown that rule by law is no answer to democratic values and/or economic success but only leads to authoritarian rule which ultimately destroys the nation. And may also lead to other nations interfering in the state's affairs as is now widely seen in other countries, as the rule by law jurisprudence is likely to breach international norms of civilised behaviour and compromise human rights value.

[125] One must not forget that when it comes to freedom of speech or assembly, etc, it is covered by 'International Human Rights Convention' and/or Asean Human Rights Declarations where art. 24 of the said declaration specifically confirms the right to freedom of peaceful assembly in which Malaysia is also a signatory and in consequence the courts have added responsibility to weigh and adjudicate. (See *Chai Kheng Lung v. Inspector*

Dzulkarnain Abdul Karim & Anor [2009] 7 CLJ 133; [2008] 8 MLJ 12). Cases which had dealt with art. 10 or art. 149 of the Federal Constitution without taking into consideration that Malaysia is a signatory to international norms, must be treated to be *per incuriam* and/or cannot stand as binding precedent. Support for the proposition is found in a number of cases. To name a few are as follows:

(a) In *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; 1984 1 CLJ (Rep) 98; [1981] 1 MLJ 29, Raja Azlan Shah AG LP (as HRH then was) in respect of the issue in discussion made the following pertinent observation:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and *Anguilla v Reynolds* [1979] 3 All ER 129, 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. Embodied in these rights are the guarantee provisions of Article 71 and the first point to note is that that right does not claim to be new. It already exists long before Merdeka, and the purpose of the entrenchment is to

protect it against encroachment. In other words the provisions of Article 71 are a graphic illustration of the depth of our heritage and the strength of our constitutional law to guarantee and protect matters of succession of a Ruler (including election of the Undangs) which already exist against encroachment, abrogation or infringement. (emphasis added).

(b) On the issue of civility the Supreme Court of India had taken into consideration international convention to promote the object of the constitutional guarantees. In *Vishaka v. State of Rajasthan* AIR 1997 SC 3011, Justice JS Verma had this to say:

> Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

[126] Freedom to assemble is a right recognised at common law at least in a restricted sense, for centuries. The Federal Constitution recognises the right and does not permit any legislation to compromise on the right to assemble save at the most to regulate. And the common law does not prohibit the right to assemble and in that process the right to demonstrate and the right to protest on matters of public concern.

However, if it is not done peaceably and without arms it will attract penal sanction under the Penal Code or any other relevant law. What art. 10 does not permit is to place penal sanction on citizen's right to assemble peacefully and without arms. Peacefully will necessarily mean as per Lord Denning "all is done peaceably and in good order, without threats or incitement to violence or obstruction in traffic, it is not prohibited." In *Hubbard v. Pitt* [1976] QB 142 Lord Denning had this to say:

> Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority – at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of common Council of London affirmed "the undoubted right of Englishmen to assemble together for the

A purpose of deliberation upon public grievances." Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction in traffic, it is not prohibited. (emphasis added).

B

[127] In essence the right to assemble peacefully is a guaranteed right in the constitution and there cannot be penal sanction legislated when citizens assemble peacefully without committing offences under the Penal Code, etc. And art. 24 of the Asean C Human Rights Declaration states as follows:

Every person has the right to freedom of peaceful assembly.

[128] Article 10 does not permit to criminalise an organiser of peaceful assembly. However, those who assemble and D subsequently breach any of the penal provision in the 'Penal Code' or other statues may be liable for criminal prosecution. It is a risk, those who assemble take and they cannot be penalised if the assembly is peaceful. The Indian Supreme Court in the case of *Kameshwar Prasad and Ors v. The State of Bihar and Anor* 1962 E AIR 1166 SC had this to say:

... a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. F It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech. It has however to be recognised that the argument before us is confined to the rule prohibiting demonstration which is a form of speech and expression or of a mere assembly and speeches therein and not other forms of G demonstration which do not fall within the content of Art. 19(1)(a) or 19(1)(b). A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles ... . It is needless to add H that from the very nature of things a demonstration may take various forms. It may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Art. 19(1)(a) or (b). It is equally be peaceful and orderly such as happens when the members of the group merely wear some badge I drawing attention to their grievances.

And went on to consider whether the rule in question was unreasonable restriction on freedom to assemble and decided as follows:

> The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration – be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result ... . We would therefore allow the appeal in part and grant the appellants a declaration that r. 4A in the form in which it now stands prohibiting "any form of demonstrations" is violative of the appellants' rights under Art. 19(1(a) and (b) and should therefore be struck down.

[129] It is now more pertinent to note, in view of Malaysia being a signatory to 'International Conventions', provisions to penalise or discourage peaceful assembly has to be readily struck down.

[130] It is well established that the freedom guaranteed by the Federal Constitution under art. 10 is not absolute in terms and subject to restriction. This principle need not be elaborated further, save to say it is the constitutional duty of the court to ensure that enshrined freedom is not violated by retrogressive legislation which attempts to alienate ourselves from international norms practised by civilised nation without meaningful grounds consistent with the Federal Constitution. It cannot be achieved on the basis of 'public order' or 'security of the Federation' etc.; when no such threat exist within the true meaning of the constitution. If such threat exists laws under the constitution may be promulgated under art. 149 which can be drastic. But that is constitutional if there are valid grounds and provided the law passes the test of 'reasonability' and' proportionality'. *It is also the constitutional duty of the court to recognise that the state has a legal as well as a constitutional duty to provide security to all its citizens* (emphasis added). Both the duties in the context of 'order' or 'security' was well articulated by Justice Swatanter Kumar in the Supreme Court decision of India in the case of *Re Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India & Ors*; where His Lordship stated:

> I have already discussed that the term 'social order' has a very wide ambit which includes 'law and order', 'public order' as well as 'security of the State'. In other words, 'social order' is an

A expression of wide amplitude. It has a direct nexus to the Preamble of the Constitution which secures justice - social, economic and political - to the people of India. An activity which could affect 'law and order' may not necessarily affect public order and an activity which might be prejudicial to public order, may not necessarily affect the security of the State. Absence of public order is an aggravated form of disturbance of public peace which affects the general course of public life, as any act which merely affects the security of others may not constitute a breach of public order. The 'security of the State', 'law and order' and 'public order' are not expressions of common meaning and connotation. To maintain and preserve public peace, public safety and the public order is unequivocal duty of the State and its organs. To ensure social security to the citizens of India is not merely a legal duty of the State but a constitutional mandate also. There can be no social order or proper state 181 governance without the State performing this function and duty in all its spheres.

Even for ensuring the exercise of the right to freedom of speech and assembly, the State would be duty bound to ensure exercise of such rights by the persons desirous of exercising such rights as well as to ensure the protection and security of the people i.e. members of the assembly as well as that of the public at large. (emphasis added)

Appellant's Grounds

[131] Learned counsel for the appellant has summarised the grounds for the application and it reads as follows:

(i) Section 9(1) and 9(5) of the Act is unconstitutional as the requirement to provide 10-days notice for an assembly is excessive and an unreasonable restriction to the right to freedom of assembly as provided under the Federal Constitution.

(ii) The criminal proceedings against the appellant is an abuse of the court process and travesty of justice.

(iii) The charge against the appellant is contrary to public policy as the appellant is a State Legislative Assemblyperson and a opposition politician and was carrying out his duties to the people and the country in good faith.

(iv) The charge against the appellant is politically motivated, and it is selective prosecution, made in bad faith and in consequence undermines the rule of law.

Submissions

[132] The submission of learned counsel for the appellant can be summarised as follows:

(a) Article 10(1) of the Federal Constitution reads as follows:

> 10. (1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms.

(b) In reliance of the following cases namely: (i) *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; 1984 1 CLJ (Rep) 98; [1981] 1 MLJ 29; (ii) *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; (iii) *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; (iv) *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; (v) *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19, says that a number of conclusion can be drawn as follows:

> (i) Any permitted restriction to a citizen's right to assemble peaceably under Article 10(2)(b) of the Federal Constitution must be read restrictively;
>
> (ii) A restriction of a citizen's right to assemble peaceably by Parliament must be reasonably necessary; and
>
> (iii) A restriction in being reasonably necessary must be proportionate to the objective sought to be achieved by the impugned provision.

(c) In reliance of the case of *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 say that:

> (i) the impugned law directly affects the fundamental liberty in question; or
>
> (ii) its inevitable effect or consequence on the fundamental liberty is such;
>
> that it makes the exercise of the fundamental liberty 'ineffective or illusory'.

(d) The preamble to PAA 2012 reads as follows:

> Act relating to the right to assemble peaceably and without arms and to provide restrictions deemed necessary or expedient relating to such right in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons, and to provide for related matters.

And s. 2 states the object as follows:

> (a) So far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies, peaceably and without arms; and
>
> (b) That the exercise of the right to organize assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons.

(e) Referring to the preamble and s. 2 of the Act, says that it can be concluded that the Act only applies to peaceful assembly without arms. It does not apply to assemblies which are not peaceful and with arms.

(f) Following from the cases cited before says that any restrictions to the right to peaceful assembly must be:

> (i) deemed necessary or expedient in the interest of the security of the Federation or any part thereof or for public order; and
>
> (ii) reasonable.

(g) The criminalisation of the failure to provide the requisite notice under s. 9(5) of the Act would mean that a person's right to peaceful assembly is subjected to the compliance of ten days notice requirement.

(h) In reliance of the case *PP v. Cheah Beng Poh, Louis & Ors & Anor* [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383, the right to peaceful assembly can only be restricted and not prohibited. The words of the Federal Constitution are clear – 'restrictions'.

(i) The restriction under s. 9(1) and the punishment under s. 9(5) does not fall under the permitted restrictions in art. 10(2)(b) or (c) of the Federal Constitution.

(j) It has not been shown that a requirement for 10-days notice to assemble peaceably have any relationship with the safeguarding of the security of the Federation and/or public order.

(k) There is nothing in the Act that allows the police to stop or disperse an assembly without the requisite notice merely because it is an assembly without the requisite notice. Section 21(1) of the Act provides for the circumstances under which the police may disperse an assembly, and does not expressly include dispersing an assembly on the sole basis of being without the requisite notice.

(l) There is also nothing in the Act that allows the police to make arrests of the participants of the assembly except under the circumstances laid down in s. 20(1) of the Act, which does not include participating in assembly without requisite notice.

(m) If the justification for notification is for to preserve public order or threats to national security, this threat does not run through the rest of the Act. Surely if notification was put in place for such purposes, the Act would also provide for other measures to further deal with such threats. Yet, there is none in the Act.

(n) If this court is minded to find that notification falls under the permitted restrictions of art. 10(2)(b) of the Federal Constitution, the next question is whether the restrictions are 'reasonable'.

(o) Applying the *Sivarasa Rasiah* principles in the present case, this court must determine whether the requirement to give ten days' notice is a reasonable restriction.

(p) What would be a reasonable restriction? Guidance may be found in the 'proportionality concept' expounded in *Sivarasa Rasiah*:

> ... all forms of state action – whether legislative or executive – that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

(q) A proportionate legislative action also would be to restrict notification only to certain types of assemblies and not a blanket requirement for all assemblies. For example, the United Kingdom's s. 11 of the Public Order Act 1986 provides that advance notice of six clear days must be given. However, this requirement is only for processions and no such requirement exists for other types of assemblies. A peaceful assembly in a stadium would not disrupt traffic nor affect business, unlike a street procession.

(r) Also, the UK Act provides that notification is not required if the procession is commonly or customarily held. There is no such exclusion in the Act. To illustrate this point, it would mean that schools must notify the police each time a school assembly is held.

(s) It would also be proportionate had the Act provided recourse for an organizer of a spontaneous or urgent assembly to avoid criminal sections. The UK Act also has a *proviso* in s. 11(1), 'unless it is not reasonably practicable to give any advance notice of the procession'. The UK Act therefore provides for situations of urgent or spontaneous processions.

(t) Further, to this point of providing recourse, in Queensland, Australia, public assemblies are governed by the Peaceful Assembly Act 1992 of Queensland, Australia. There is a five days notification requirement for public assemblies in order for it to become an 'approved assembly':

(i) The Queensland Act does not criminalise non-notification, only that such an assembly is not an 'approved assembly'.

(ii) Non-notification only becomes non-authorisation if the relevant authority applies to court for an order not to authorize the assembly.

(iii) If notice is given less than 5 days, the organizer may apply to court for an order authorizing the assembly.

(u) The Act has essentially created a strict liability offence. There is not mental element that must be established to be guilty of the offence.

(v) This is disproportionate to the objective that the Parliament sought to achieve through the Act ie, to facilitate and regulate the right to peaceful assembly. As such, it is submitted that ss. 9(1) and (5) of the Act is an unreasonable restriction to the right to peaceful assembly.

(w) It is submitted that upon a plain, unambiguous reading of the impugned sections, it is clear the impugned sections are unreasonable restrictions to the freedom to peaceably assemble, so that a court deciding the constitutionality of the sections should have no other choice but to decide that the sections are unconstitutional.

(x) Restriction is unreasonable as the right to peaceably assemble is exercised under threat of punishment.

Sections 9(1) and (5) when read together produces the following result:

(i) A person exercising his constitutional rights under 'Article 10(1)(b), if he fails to give notice, is punished for exercising the very right guaranteed by the Federal Constitution.

(ii) If notice is not given, then the appellant exercises his fundamental right under threat of punishment; that, it is submitted is an unreasonable restriction and which renders the right illusory. Therefore, section 9(1) and 9(5) infringe article 10(1)(b) and is illegal, *ultra vires* and void in law.

(y) Restrictions go against the very object of the PAA:

(i) The long title of PAA states:

> An Act relating to the right to assemble peaceably and without arms, and to provide restrictions deemed necessary or expedient relating to such right in the interest of the security of the Federation or any part thereof or public order, including the protection thereof the rights and freedoms of other persons, and to provide for related matters.

(ii) It will be noted from the above that the object of the PAA is to enable the exercise of the very right of citizens to assemble peaceably.

(iii) However, s. 9(1) and 9(5), contrary to the object stated in the long title, punishes citizens exercising the right to assemble peaceably.

(iv) In other words, the effect of s. 9(1) and s. 9(5) is to punish even though the assembly is peaceable and consistent with the object of the Act.

(v) A restriction which breaches the object of the Act itself as stated in the long title is an unreasonable restriction and a disproportionate legislative response.

(z) Indirect prohibition of a fundamental right is still unreasonable.

(i) The effect of s. 9(1) and s. 9(5) is to prohibit any assembly, even though it is peaceable, if no notice is given.

(ii) S. 9(1) and (5) thus indirectly disobey the constitutional prohibitions which bind Parliament. In *Dwarkadas Shrinivas* of *Bombay v. The Sholapur Spinning & Weaving Co. Ltd. and other* (AIR) (41) 1954 SC 119 states:

> In relation to constitutional prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. *Therefore, in all such cases the court has to look behind the names, forms and appearances to discover the true character and nature of the legislation.* (emphasis added)

(aa) Sections 9(1) and (5) are not restrictions, but punishment.

(i) S. 9(1) and (5) do not facilitate or allow the right to assembly peaceably, but punish the exercise of that right.

(ii) S. 9(1) and (5) are thus not restrictions as provided in Act 10(2)(b), but are punishment of the right to assembly peaceably. It is therefore not a reasonable restriction.

(bb) Striking down s. 9(1) and 9(5) does not affect power of the State to pre-empt certain assemblies and to punish unpeaceful assemblies.

(i) Public Order can be safeguarded without the necessity to punish peaceful assemblies;

(ii) Police have existing powers to pre-empt certain assemblies pursuant s. 98 of the CPC;

(iii) Chapter VIII of CPC also allows for dispersal of any assembly that may cause disturbance of peace;

(iv) In addition, s. 21 of the PAA gives powers to police to disperse disorderly assemblies;

(v) Further, Chapter VIII of the Penal Code punishes unpeaceful assemblies;

(vi) In any event, it will be up to the legislature to make any consequential amendments (if necessary) to the PAA should this court strike down s. 9(1) and s. 9(5).

[133] The learned Senior Federal Counsel concedes that it is ultimately for the court to decide whether a restriction is reasonable and is in accordance with the doctrine of proportionality taking into consideration art. 4(2)(b) of the Federal Constitution. And relies on the decision of the Supreme Court of India in *Om Kumar & Ors v. Union of India* AIR 2000 SC 3689 to assert that the principle of proportionality is that courts will have to weigh for itself the advantages and disadvantages of certain law. And says only if the balance is advantageous, should the court uphold the impeded legal restriction or prohibition imposed by such law. A part of the submission which is relevant reads as follows:

> The implication of the principle of proportionality is that courts will have to weigh for itself the advantages and disadvantages of a certain law. Only if the balance is advantageous, should the court uphold the impeded legal restriction or prohibition imposed by such law. Applying this to the current case before this Honourable Court, a question would arise as to whether section 9(1) of PAA passes the test of proportionality.
>
> This then has to be read in line with Article 10(2)(b) of the Federal Constitution. Article 10(2)(b) enables the Parliament to impose restrictions on the right to assemble as it deems necessary or expedient in the interest of security or public order. This would then enable the Parliament to legislate laws that provides restrictions upon the right of citizen's to assemble.
>
> In accordance to such provision, the PAA was legislated to provide restrictions upon the right to assemble. Through the Act several restrictions were laid out to restrict the right to assemble. These restrictions were ultimately generated for the purpose of ensuring the rights and freedom of the public at large. Legislative restrictions such as these are made with the objective of prioritizing public peace within the community.

[134] It is of great interest to note that the learned Senior Federal Counsel, in asserting that the legislature has the power to penalise a particular act, had submitted as follows:

> It is our humble submission the punishment or sanction under section 9 of PAA which is attached by the law to breaches or violations of criminal law is (whatever other purpose punishment may serve) intended to provide one motive for abstaining from an organizer organizing an assembly disobeying the restrictions that had been imposed upon him. Legislator's purpose in making laws would be defeated unless there are penalties whenever rules are disobeyed.

[135] In addition, the learned Senior Federal Counsel asserts the restriction imposed has a direct nexus with maintaining public tranquillity. And quite surprisingly places the burden on the appellant. That part of the submission reads as follows:

> It is respectfully submitted that subsection 9(1) of PAA is constitutional as the restrictions and limitations imposed in the said provision against an organizer of a proposed assembly are well within the scope and ambit of Article 10 of Federal Constitution because the restriction imposed by subsection 9(1) of PAA has direct link with maintaining public tranquility between the citizens. *Until now the appellant had failed to show to the court that subsection 9(1) and section 12 of PAA was not created for the protecting the rights of other citizens as were provided in the Federal Constitution that would have been affected by the action of the appellant by not complying with subsection 9(1) of PAA.* (emphasis added)

[136] In opposing this appeal the learned Senior Federal Counsel has relied on a number of cases, to name a few are as follows:

(i) *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507;

(ii) *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19;

(iii) *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300;

(iv) *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1;

(v) *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566;

(vi) *PP v. Karpal Singh Ram Singh* [2012] 5 CLJ 580; [2012] 4 MLJ 443;

(vii) *Yong Kar Mun v. PP* [2013] 5 CLJ 751; [2012] 6 MLJ 209;

(viii) *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50;

(ix) *PP v. Bird Dominic Jude* [2013] 8 CLJ 471.

[137] As the law is well settled, I do not think all cases need to be considered in this judgment.

[138] I have read the appeal records, the memorandum of appeal and the submissions of the parties in detail. I am grateful to the learned counsel for the comprehensive submission. After giving much consideration to the submission of the Senior Federal Counsel, I take the view that the appeal must be allowed partly to say s. 9(5) of the PAA 2012 is unconstitutional and ought to be struck down. My reasons *inter alia* are as follows:

(a) It is well settled that there is a presumption in favour of the constitutionality of an Act of Parliament. The burden is placed on the party who says that there is a transgression of the constitutional rights. In *Ram Krishna Dalmia v. Shri Justice SR Tendolkar and Ors* 1958 AIR 538 SC, the Indian Supreme Court had this to say:

> ... (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

(b) The court is empowered under art. 4(1) of the Federal Constitution to declare as void any law or part thereof as void to the extent of its inconsistency with the constitution. That is to say that part which is inconsistent can be severed if that is severable under the doctrine of severability. (See *RMD Chamarbaugwalla v. The Union of India* 1957 AIR 628 SC). Some limitation to art. 4(1) has been spelt out in arts. 4(2), (3) and (4) and the most relevant to freedom of assembly and the restrictions Parliament can impose is set out in art. 4(2)(b). Articles 4(1) and 4(2) read as follows:

> 4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> (2) The validity of any law shall not be questioned on the ground that:
>
> (a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or

A

(b) it imposes such restrictions as are mentioned in Clause (2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

B

(c) By virtue of art. 4(2)(b) the appellant is not entitled to canvass that the restrictions complained of were not deemed necessary or expedient. However, the appellants are not restrained from arguing that the restrictions do not satisfy the 'reasonable restriction test' expounded in a number of cases. And if the restrictions satisfy the test of reasonableness it must not also fail under the test of proportionality which is a developing jurisprudence in civilised jurisdiction to ascertain a just and fair adjudication process.

C

D

(d) It is essential to note that arts. 10(2)(a), (b) and (c) provide for restrictions but does not assert any relief in the nature of penal sanction for the breach of the restriction. That is to say art. 10, itself does not criminalise the breach of the restriction. Under art. 10(2), restriction cannot be read synonymous with legal sanction or assert if there is a breach of restriction there must be a legal sanction. Restrictions are procedural and/or administrative in nature. The Penal Code and Criminal Procedure Code and/or specific law have sufficient penal laws to check 'law and order', 'public order', 'security of the Federation', 'public tranquillity', etc. The framers of the Constitution did not provide for penal sanction or enactment of penal sanction for breach of restrictions. They have left it to the existing penal laws to check any form of lawlessness by the public or part thereof. In India any lawlessness by the public is adequately dealt by the Penal Code or CPC, etc.; and no penal sanction is in place for breach of restrictions placed under art. 19 (similar to our art. 10) which can entitle the state to prefer a charge **solely on the breach of restriction pursuant to the article.** (emphasis added). Generally in India for any breach relating to assembly, s. 144 of their Criminal Procedure Code is often used. When restrictions are breached it will entail the 'police' to take proactive steps to maintain 'law and order', inclusive of declaring the assembly as unlawful. And that section reads as follows:

E

F

G

H

I

(1) In cases where, in the opinion of' a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf,

there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material fact of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

(2) An order under this section may, in cases of' emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex-parte*.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any, affray, it may by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate Subordinate to him or by his predecessor-in-office.

(6) The State Government may either on its own motion or on the application of any person aggrieved, rescind or alter an order made by it under the proviso to sub-section (4).

(7) Where an application under subsection (5), or subsection (6) is received, the Magistrate, or the State Government, as the case may be shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader

A and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part he or it shall record in writing the reasons-for so doing.

B **[139]** From the preamble of the PAA 2012 or s. 3 it cannot be said the PAA 2012 is anchored under art. 149 of the Federal Constitution which permits legislation against subversion, action prejudicial to public order, etc.; which may be inconsistent with art. 10. The said art. 149 reads as follows:

C 149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

D

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

E

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

F

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

G

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

H

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

I

[140] In essence, art. 10 must be in conformity with the general jurisprudence relating to 'reasonableness' and 'proportionately' and any provision under art. 149 cannot be legislated arbitrarily and/or enforced arbitrarily with a view to defeat constitutional guarantees entrenched in the Constitution. The strict rules relating to the doctrine of 'reasonability' and 'proportionality' will run through all legislation which attempts to restrict or void provisions relating to fundamental guarantees. The court is duty bound and entrusted to protect the sacrosanct right of the public in relation to fundamental guarantees and it is an important part of the constitutional oath of a judge. Layman's interpretation of the Constitution must be avoided and jurisprudential interpretation with a purposive analogy consistent with international norms must be taken as the order of the day when constitutional guarantees are impinged by legislative enactment or executive actions. And very importantly decision makers must note that layman's interpretation of a constitutional provision to whittle down or defeat constitutional guarantees will in actual fact erode public confidence in the judiciary and lead to anarchy. The court needs to balance whether the restrictions imposed on the constitutionally guaranteed freedoms are proportionate to the legitimate aims as set out in the Constitution. The test is one of 'legitimate aim' and nothing less. Support for the jurisprudence wholly or partly and/or in composite can be found in a number of decisions of the Indian Supreme Court and also case laws of other jurisdictions which do not subscribe to authoritarian rule.

[141] It is not permissible to read into art. 10 to permit for criminalization of breach of restriction *per se* more so to restriction which has nothing to do with the assembly *per se*. That is to say PAA 2012 gives a right for everyone to assemble whether notice was or was not given. To criminalise for not giving notice and penalising the organiser in fact has no nexus to 'public order' or 'interest of the security of the Federation' unless the assembly was not peaceful. In crux, s. 9(5) must fail under 'reasonable test' as well as the 'proportionality test' as it has no nexus to 'public order', 'security of the Federation' and/or an assembly which was not peaceful.

[142] The learned Federal Counsel was candid in saying 'reasonable restriction' contemplated under the Federal Constitution brings the matter under the domain of the court and the question of reasonableness is a question primarily for the court to decide. (See *Babulal Parate v. State of Maharashtra* (1961) 3 SCR 423).

[143] There are many criteria court takes into consideration to adjudicate on the issue of reasonableness of a restriction as well as prohibition. Some of them are as follows: (i) the duration and extent of the restrictions; (ii) the circumstances under which and the manner in which the imposition has been authorised; (iii) the nature of the right infringed; (iv) the underlying purpose of the restrictions imposed; (v) the extent and urgency of the evil sought to be remedied thereby; (vi) the disproportion of the imposition; (vii) the prevailing conditions at the time, etc. (See *Chintaman Rao & Anor v. State of Madhya Pradesh* 1951 AIR 118 SC). In *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors* [2005] 8 SCC 534, the Supreme Court of India held:

> Three propositions are well settled: (i) 'restriction' includes cases of 'prohibition'; (ii) the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate; and (iii) whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right ...

[144] In essence, restrictions imposed cannot be arbitrary or excessive and must possess direct and proximate nexus with the object sought to be achieved.

[145] The doctrine of 'proportionality' in the construction and/or interpretation of the Constitution or statues advocate a criterion of fairness and justice. The Court of Justice of the European Community has laid down the principle of proportionality as, "In order to determine whether a provision of community law is consonant with the principle of proportionality it is necessary to establish, in the first place whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievements". The doctrine of proportionality is a developing jurisprudence and it is still in the stage of infancy in many jurisdiction but has been readily accepted in civilised jurisdiction where democratic values are norms.

[146] The doctrine of proportionality when used in the context of fundamental rights involves a 'balancing' and the 'necessity' test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interest and a manifest imbalance of relevant consideration. The "necessity test" means that the

infringement of fundamental rights in question must be by the least restrictive alternative. (See article by Dr Poonam Rawat '*Doctrine of Proportionality*' – Dehradun Law Review].

[147] In considering the issue of proportionality under art. 10(2) it is incumbent to appreciate 'law and order' and 'public order'. 'Law and order' *per se* is a matter within the purview of penal laws. 'Public order' or 'interest of security of the Federation' and restriction thereof must stand the test of 'reasonability' when it impinges on art. 10. in *Re: Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India & Ors*, the Supreme Court of India stated:

> The distinction between 'public order' and 'law and order' is a fine one, but nevertheless clear. A restriction imposed with 'law and order' in mind would be least intruding into the guarantee freedom while 'public order' may qualify for a greater degree of restriction since public order is a matter of even greater 'social concern. Out of all expressions used in this regard, as discussed in the earlier part of this judgment, 'security of the state' is the paramount and the State can impose restrictions upon the freedom, which may comparatively be more stringent than those imposed in relation to maintenance of 'public order' and 'law and order'.
>
> However stringent may these restrictions be, they must stand the test of 'reasonability'. *The State would have to satisfy the Court that the imposition of such restrictions is not only in the interest of the security of the State but is also within the framework of Articles 19(2) and 19(3) of the Constitution.* (emphasis added)

[148] It must be emphasised here that the burden is on the state to satisfy the court that the imposition of such restrictions is not only in the interest of the 'security of the Federation' or 'public order' but to also satisfy the test of reasonability and falls within the parameters or framework of art. 10(2) of the Federal Constitution. General averment as in this case that it was meant for those purposes stated in Constitution (ie, public order or security of Federation, etc.) and the Constitution does provide for such laws to be enacted will not satisfy the jurisprudence related to such issues.

[149] In addition, the learned Senior Federal Counsel's submission that when there are restrictions or condition as stated in s. 9(1), will be meaningless if there is no penal sanction for its breach. Such a line of argument will also not be correct when taking a composite analysis of PAA 2012. PAA 2012 has a

number of sections which provide for restrictions and or conditions, the breach of which does not attract penal sanctions. For example, ss. 6 and 7 of the PAA 2012 place a number of restrictions or conditions for the organisers or participants for the common good to maintain law and order, with no penal sanction for its breach. Sections 6 and 7 read as follows:

> 6. (1) An organizer shall ensure that an assembly is in compliance with this Act and any other written law.
>
> (2) For the purpose of subsection (1), the organizer shall:
>
> (a) Ensure that the organization and conduct of an assembly is not in contravention of this Act or any order issued under this Act or any other written law;
>
> (b) Ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or do anything which will disturb public tranquility;
>
> (c) Ensure that he or any other person at the assembly does not commit any offence under any written law;
>
> (d) Ensure that the organization and conduct of an assembly is in accordance with the notification of assembly given under subsection 9(1) and any restrictions and conditions which may be imposed under section 15;
>
> (e) Appoint such number of persons as he thinks necessary to be in charge of the orderly conduct of the assembly;
>
> (f) Co-operate with the public authorities;
>
> (g) Ensure that the assembly will not endanger health or cause damage to property or the environment;
>
> (h) Ensure that the assembly will not cause any significant inconvenience to the public at large;
>
> (i) Ensure the clean-up of the place of assembly or beat the cleanup cost of the place of assembly; and
>
> (j) In the case of simultaneous assemblies or counter assemblies, ensure that the organization of the assemblies are not intended to specifically prevent the other assembly from taking place or interfere with the organization of such assembly.

7. A participant shall:

(a) Refrain from:

(i) Disrupting or preventing any assembly;

(ii) Behaving offensively or abusively towards any persons;

(iii) Doing any act or making any statement which has the tendency to promote feelings of ill-will or hostility amongst the public at large or doing anything which will disturb public tranquility;

(iv) Committing any offence under any written law at any assembly; and

(v) Causing damage to property; and

(b) adhere to the orders given by the police, organizer or any person appointed by the organizer to be in charge of the orderly conduct of the assembly.

[150] The learned Senior Federal Counsel's argument that a breach of s. 9(1) ought to attract penal sanction cannot be correct in light of art. 10(2) of the Federal Constitution. The PAA 2012 is a laudable Act which allows as a matter of right for the public to attend peacefully and without arms. It only attempts to penalise the organisers (i) in the event the ten days notice is not given; (ii) when notice is given then the police may state restrictions and conditions which need to be followed under s. 15 and if there is a breach there is penal sanction. There is no provision for those who assemble peacefully and without arms at all to be charged for any offence under PAA 2012. In my considered view, if the assembly itself was peaceful then a penal sanction against the organisers will not qualify for any intended protection having direct nexus or proximity to art. 10(2) of the Federal Constitution. Support for the proposition can be found in a number of cases as well as articles. It is interesting to note an article written in relation to Hong Kong laws relating to Constitution, freedom to assemble peacefully and imposition of criminal sanction for breach of restriction reads as follows:

Prior Notification – Criminalizing Unnotified Assembly

S17A of the Ordinance makes it an offence for all unnotified assembly. This is disproportionate to peaceful assembly and conflicting the notion of freedom of peaceful assembly. Moreover, this is not proportionate to the aims for notification requirement.

A On the other hand, there are other measures which could be used by the police for proper policing in cases of unnotified assembly. Ss18 and 19 of the Ordinance created offences for any assembly involving breach of the peace and riot. The two sections enable the police to interrupt unlawful assembly and thus protect
B legitimate aims in a society. S10 of the Police Force Ordinance provides that the police can take lawful measures on various occasions including preservation of public peace, prevention of injury to life and person, regulation of public meetings and assemblies, preservation of public order in processions and assemblies, traffic control, etc.

C These alternative measures already enable proper policing of assemblies, thus rendering the criminalizing of unnotified assembly unnecessarily.

Prevention of and punishing unlawful assembly are not the same.
D The freedom is protected by the constitution, every restriction especially those involving criminal sanction on the freedom should be imposed with great cautions and only in situations where there is a real necessity. The same position was put forward by the ECHR in *Sener v. Turkey* where it is suggested that even though a State would need to protect its citizens from public order, its
E response should not be in excess. *Thus, any criminal offence deriving from the exercise of fundamental freedoms should be narrowly defined.* (emphasis added)

[Note: The Hong Kong provisions are not similar to our
F provisions. [See Public Order Ordinance Cap 245; *Leong Kwok Hung & Others v. HKSAR* [2005] 3 H.K.L.R.D. 164]

[151] Taking into consideration the rigid test relating to 'reasonable restriction' I do not think that the 'ten days' notice period is excessive and/or breach of art. 10(2) as there is no
G prohibition for the public to assemble peacefully and without arms at any time, day or night. In my view the 'ten days' notice to be given by the organisers complained of has nothing to do with art. 10(2) and it will be superfluous to apply the 'reasonable restrictions' jurisprudence to the organisers even though it may
H seen to be an indirect way to discourage peaceful assembly. However, the sting of ten days notice will be absent if there is no penal sanction, as it will only stand as a restriction or condition similar to what is stated in s. 6 of the PAA 2012 without any penal sanction.

I **[152]** I am of the considered view that the PAA 2012 (save for penal sanctions) is an Act within the spirit and intent of art. 10 of the Federal Constitution recognising freedom to assemble. The

organisers should follow the restrictions stated in the Act and/or any reasonable restrictions stated by the police to maintain law and order and provide not only security but proper facilities to ensure citizen to assemble without fear and in that process does not become victim of unexpected incidents. This is a social responsibility for the organisers and should not be compromised for any reason whatsoever. If the organisers do not comply with reasonable restriction there is no prohibition for the law enforcement agencies to take action as provided by the penal laws or other provisions of the CPC to maintain law and order if reasonably necessary taking into consideration the right to assemble peacefully and without arms is an enshrined right.

[153] In addition, I must say that the scheme of the Federal Constitution does not encourage any form of aggressive protest such as the appellant, in the instant case, attempts to justify. The Constitution provides proper relief for such cause and such protest should not be considered without exhausting the constitutional remedies.

[154] If the public is concerned with the conduct of legislatures or executive or judiciary and/or constitutional functionaries such as the police, attorney general or election commission, etc.; the proper procedure under the Federal Constitution is to lodge complaint petition to His Majesty and His Majesty under the Constitution if satisfied that the rules of law and/or order in the country had not been sustained is obliged to consider the problem, assess the consequence, evaluate alternative and if need be advance the remedy.

[155] It must be stated that pillars of the Constitution as well as constitutional functionaries, to maintain peace, prosperity, harmony and economic success of the nation should consider in any decision making process the 'mantra' for a progressive nation, the words enunciated by the former Head of the Judiciary Tun Suffian with such modification as necessary to suit the relevant pillars or functionaries. The 'mantra' for the success of the nation as enunciated by our great sage of the law reads as follows:

> As for being a good judge, I would say a judge should be a person who has a sound understanding of general principles and has judicial temperament, that is to say, he is a person who is willing to listen and is capable of learning more law as he goes along; who is courteous, has an instinctive 'feel' for what is proper and what is not, for what is right and what is not in and out of court; and a person who is not personal and vindictive,

A who will decide solely on the facts as disclosed in the evidence before him and in accordance with his perception of the law, with his ideas of justice and in accordance with his conscience. *In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim*
B *or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion-so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.* (emphasis added)

C

[156] Any pillar or constitutional functionary which attempts an antithesis to the above 'mantra' is bound to create misery and anarchy to the nation. And such conduct in composite will void the Federal Constitution.

D

[157] For reasons stated above, I will hold that s. 9(5) is inconsistent with art. 10(2) of the Federal Constitution and in consequence is struck down.

I hereby order so.

E

F

G

H

I